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{SHOW }  PROCEEDINGS AND ORDERS  DATE: 110785

CASE NBR 85-1-00130 CFX
SHORT TITLE CA St. Bd. of Equalization  DOCKETED: Jul 22 1985
VERSUS Chemehuevi Indian Tribe

| Date | Proceedings and Orders |
|---|---|
| Jul 22 1985 | Petition for writ of certiorari filed. |
| Jul 12 1985 | Application for stay filed (A-38), and order granting same by Rehnquist, J. on July 18, 1985. |
| Aug 19 1985 | Order extending time to file response to petition until September 5, 1985. |
| Sep 5 1985 | Brief of respondent Chemehuevi Indian Tribe in opposition filed. |
| Sep 11 1985 | DISTRIBUTED. September 30, 1985 |
| Oct 7 1985 | REDISTRIBUTED. October 11, 1985 |
| Oct 15 1985 | REDISTRIBUTED. October 18, 1985 |
| Jul 12 1985 | Application for stay filed. |
| Jul 12 1985 | Response requested. Due July 17, 1985 at 3:00 p.m. |
| Jul 16 1985 | Response of Ca. State Bd. of Equalization filed. |
| Jul 18 1985 | Application for stay granted by Rehnquist, J. |
| Oct 21 1985 | REDISTRIBUTED. November 1, 1985 |

CONTINUE {

PROCEEDINGS AND ORDERS  DATE: 110785

CASE NBR 85-1-00130 CFX
SHORT TITLE CA St. Bd. of Equalization  DOCKETED: Jul 22 1985
VERSUS Chemehuevi Indian Tribe

| Date | Proceedings and Orders |
|---|---|
| Nov 4 1985 | Petition GRANTED. Judgment REVERSED. Justice Brennan would deny certiorari. Dissenting statement from summary disposition by Justice Marshall. Justice Blackmun would grant certiorari and give the case plenary consideration. Dissenting opinion by Justice Stevens. Opinion per curiam. |

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# PETITION FOR WRIT OF CERTIORARI

85-130

No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

CALIFORNIA STATE BOARD OF EQUALIZATION, et al.,
*Petitioners,*

vs.

THE CHEMEHUEVI INDIAN TRIBE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. May a State impose a tax upon non-Indians who purchase cigarettes on an Indian reservation and require collection of the tax by the Tribe?

2. May the incidence of the tax be shifted on the basis of the constitutional taxability of a party to the transaction?

3. Do the provisions of the California Cigarette Tax Law impose its incidence upon constitutionally taxable non-Indian purchasers?

4. Where an Indian Tribe initiates action for declaratory relief and an injunction against enforcement of a State tax upon non-Indians, does tribal sovereign immunity bar a counterclaim by the State to compel collection and payment of the tax by the Tribe if the tax is determined to be valid?

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No.

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OCTOBER TERM, 1985

CALIFORNIA STATE BOARD OF EQUALIZATION, et al.,
*Petitioners,*

v.

THE CHEMEHUEVI INDIAN TRIBE,
*Respondent.*

Petitioners California State Board of Equalization and its members pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 12, 1985.

## OPINION BELOW

The opinion of the Court of Appeals, although certified for publication, has not yet been reported. A copy of the opinion is attached to this petition as Appendix A.

## JURISDICTION

The opinion of the Court of Appeals was issued on April 12, 1985. A petition for rehearing was filed on April 27 and denied on June 14, 1985.[1]

This petition is timely filed within 90 days of June 14, 1985. Jurisdiction of this Court is invoked under Title 28, United States Code sections 1254(1) and 2101(c).

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[1] A Motion for Stay of Mandate was filed by Petitioners on June 26 and denied on July 5, 1985. An Application for Stay has been made to Justice Rehnquist.

## CONSTITUTIONAL PROVISION INVOLVED

Article 1, section 8, clause 3 of the Constitution of the United States vests in the Congress of the United States the power "[T]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes; . . . "

## STATEMENT OF THE CASE

The State of California imposes a tax upon the distribution of untaxed cigarettes. "Distribution" may be by the sale, use or consumption or placement in vending machines of untaxed cigarettes. "Untaxed cigarettes" are defined as cigarettes which have not yet been "distributed in such manner as to result in a tax liability . . . " Distributors who sell cigarettes "with respect to the sale of which the tax . . . is applicable" are required to collect the tax from the purchaser and remit tax proceeds to State taxing authorities.

The Chemehuevi Indian Tribe is a federally recognized Indian tribe residing on a reservation located on the western shore of Lake Havasu and entirely within the State of California. Approximately 75 members of the tribe reside on the reservation. Approximately 170 members of the tribe reside outside the boundaries of the reservation within the State of California and are eligible to receive all public services which all State citizens and residents receive from the State, county and city of their residence. In addition to tribal members, the population of the reservation consists of approximately 870 non-tribal members (Indian and non-Indian).

The tribe conducts a number of commercial enterprises on the reservation. Among these enterprises are included a grocery store, which includes a tribal retail tobacco outlet; a bar; a restaurant; a marina; a boathouse which includes a gas station; tackle shop; campground; motel; wildlife program which includes the sale of fishing licenses; and a joint partnership for the retail sale of mobile homes. Retail sales are made by the tribe to both tribal members and non-Indian residents and non-residents of the reservation.



In 1977, the tribe enacted a Tribal Retail Tobacco Outlet Ordinance and levied a tribal excise tax equal to the State cigarette tax upon the purchase or possession of cigarettes or other tobacco products on the reservation. The ordinance was revised in 1980 and continued to fully tax on-reservation sales of cigarettes at a rate equivalent to the State cigarette tax. Claiming exemption from the State tax, the tribe declined to collect and remit the State cigarette tax to taxing authorities.

Petitioner Board of Equalization thereafter issued a withhold notice to the bank which held tribal accounts and advised the bank that the Board had determined that the tribe was delinquent in the payment of taxes due to the State. The bank notified the Tribe that it would not release to it monies in tribal accounts until the balance of taxes due were paid. The Board thereafter recorded a lien against tribal property and assets located in San Bernardino and Los Angeles Counties for taxes claimed to be due and owing. The Board also had issued a warrant to the sheriff of Los Angeles County directing him to seize and sell tribal assets if necessary to satisfy claimed liens.

In response, the Tribe filed suit in the United States District Court for the Northern District of California seeking to enjoin the Board from enforcing its cigarette tax law against the tribe and to prevent the State from otherwise interferring with the operation of the business enterprises of the Tribe. Petitioners filed a counterclaim for the amount of taxes alleged to be due. Such counterclaim was dismissed on December 12, 1979.

By order and formal judgment entered on September 15, 1983, the United States District Court entered judgment for Petitioners Board and its members denying the Tribe's request for injunctive relief. In rendering its decision, the District Court relied heavily on the decision of this Court in *Washington v. Confederated Tribes of the Colville Indian Reservation* 447 U.S. 134 (1980). Analogizing the California cigarette tax statutory provisions to the Washington statutes which were considered in the *Confederated Tribes* case, the District Court concluded that California Revenue and Taxation Code section 30108(a) constituted a mandatory "pass-through" provision as a result of which the legal incidence of the tax was upon the non-Indian purchasers rather than upon

the non-taxable tribal seller. The Court upheld the validity of the California cigarette tax and the requirement that the Tribe collect the tax from the purchasers and remit the proceeds to taxing authorities. A copy of the non-published opinion of the District Court is attached as Appendix B.

The Tribe appealed from the District Court judgment and Petitioners cross-appealed from dismissal of the counterclaim. By its decision of April 12, 1985, the Court of Appeals reversed the judgment of the District Court and affirmed the order dismissing the counterclaim.

## REASONS FOR GRANTING THE WRIT

### 1. The Decision Below Conflicts With the Controlling Decision of This court Involving Shifting Incidence of a State Cigarette Tax From a Non-taxable Tribal Seller to a Taxable Non-Indian Purchaser.

It is well established that, in the absence of expressed Congressional authorization, direct State taxation of tribal property or the income of reservation Indians is preempted by applicable federal law which creates the reservation. *Bryan v. Itasca County*, 426 U.S. 373, 376-77 (1976); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 179-81 (1973). This elementary principle is not challenged by Petitioners.

It is, however, equally well established that a State tax, the incidence of which falls upon non-Indians is permissible and enforceable. Where a State requires that the tax be passed on to the purchaser and collected by the seller, the legal incidence of the tax has been held to fall upon the purchaser. *Washington v. Confederated Tribes of the Colville Indian Reservation, supra*, 142; *Moe v. Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976); *First Agricultural Nat'l Bank of Berkshire County v. State Tax Comm'n*, 392 U.S. 339, 346 (1968). See also *United States v. Mississippi Tax Comm'n*, 421 U.S. 599, 608 (1975).

The decision of the Ninth Circuit Court of Appeals is contrary to the decision and rationale of this Court in the *Confederated Tribes* case notwithstanding significant similarity between the



California tax statutes at issue and the Washington State statutes which were considered by this Court in the *Confederated Tribes* case. The effect of the Ninth Circuit decision is to preclude shifting of the incidence of the California tax from non-taxable Indian sellers to taxable non-Indian purchasers in the absence of an express statement of legislative intent to shift incidence where necessary to avoid imposition of a constitutionally impermissible tax. Such was neither required by this Court in the *Confederated Tribes* decision nor rationally justifiable so long as a shift of incidence or "pass-through" is contemplated by the statutory scheme. Granting of the writ is necessary to compel adherence to the principles enunciated in and to clarify the rationale for the *Confederated Tribes* decision of this Court. Issues involving the State taxation of tribal commerce with non-Indians are significant and recurring.[2]

In the *Confederated Tribes* case, this Court considered a cigarette tax which was imposed by the State of Washington. The tax was levied upon the "sale, use, consumption, handling, possession or distribution of all cigarettes (within the State of Washington)." Wash. Rev. Code § 82.24.020. As set forth in section 82.24.080 of the Washington Code, the expressed intent and purpose of the chapter was "to levy a tax on all of the articles taxed herein sold, used, consumed, handled, possessed or distributed within the state and to collect the tax from the person who first sells, uses, consumes, handles, possesses . . . or distributes them in this state." The same section provided that it was "also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event occurring within the state."

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[2] At least two other cases involving validity of California cigarette and Sales and Use Taxes upon tribal sales to non-Indians are pending in District Courts in the State of California at this time. *The Big Pine Band of Owens Valley Paiute-Shoshone Indians, et al. v. Bennett, et al.*, U.S.D.C., N.D. Cal. No. C83-0056 RFP involves a challenge to the validity of California Cigarette and Sales and Use Taxes. *The Chemehuevi Indian Tribe v. California State Board of Equalization, et al.*, U.S.D.C., E.D. Cal. No. CIVS-83-1465 LKK involves a challenge to California Sales and Use Tax laws.

In its interpretation of these statutory provisions, the District Court in the *Confederated Tribes* case found that the legal incidence of the tax was upon the purchaser in transactions between an Indian seller and a non-Indian buyer. In footnote 9 at page 142 of its Decision, this Court stated the following:

> "Essentially, the court accepted the State's contention that the tax falls upon the first event which may constitutionally be subjected to it. In the case of sales by non-Indians to non-Indians, this means the incidence of the tax is upon the seller or perhaps on someone even further up the chain of distribution, because that person is the one who first sells, uses, consumes, handles, possesses or distributes the products. But where the wholesaler or retailer is an Indian on whom the tax cannot be imposed under *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973), the first taxable event is the use, consumption, or possession by the non-Indian purchaser. Hence, the District Court concluded, the tax falls on that purchaser. We accept this conclusion."

The California cigarette tax law requires that the tax be paid by distributors upon their distributions. Cal. Rev. & Tax. Code § 30101. "Distribution" is defined as the "*sale of untaxed cigarettes*" . . . , "*use or consumption of untaxed cigarettes*" . . . *(or) "placing . . . untaxed cigarettes in a vending machine . . .*". Cal. Rev. & Tax. Code § 30008. Untaxed cigarettes are defined as cigarettes "which have *not yet been distributed in such manner as to result in a tax liability . . .*". (Emphasis added.) Cal. Rev. & Tax. Code § 30005. Section 30108 requires that the distributor collect the tax from the purchaser upon the sale of "cigarettes with respect to the sale of which the tax imposed by section 30101 is inapplicable . . . ".

In light of the fact that there are three separate definitions for "distribution" the California Legislature has clearly contemplated that the incidence of the tax may vary depending upon the circumstances of the "distribution." It is obviously not contemplated that the tax be imposed upon each "distribution" so as to result in multiple taxation. Equally obviously, and pursuant to the provisions of section 30108, the Legislature has contemplated that there will be circumstances under which a distributor/seller will



not be subject to the tax and, under such circumstances, must collect the tax from the user/consumer. These provisions are effective when the user/consumer comes into possession of cigarettes not previously "distributed" in a manner such as to result in tax liability pursuant to the provisions of section 30005.

Because a tax upon the Tribe as distributor/seller is agreed to be constitutionally impermissible, Petitioners have consistently asserted in both the trial court and Court of Appeals that the tribal distribution/sale is one with respect to which the tax imposed by section 30101 is inapplicable and that the tribe is therefore required to collect the tax from the purchaser/user/consumer pursuant to the provisions of section 30108.

As in the *Confederated Tribes* case, the trial court in the instant case construed the State taxing statutes to effect a mandatory "pass-through" as the result of which the legal incidence of the tax falls upon the non-Indian purchaser. In adopting such construction, the trial court enunciated its rationale as follows:

> "The cigarette tax scheme is basically composed of a sales tax payable at the wholesale level with a compensating use tax imposed upon persons who use or consume cigarettes when the sale of those cigarettes cannot be subject to the California tax. A vendor of cigarettes, the sale of which is not subject to the California tax, must collect the tax from the user and pay the tax to the state . . . Thus, in the instant case, since the tax cannot constitutionally be imposed upon Indian vendors, the incidence of the tax, as in *Colville,* falls upon the purchaser, although the Indian tribe remains liable for the collection of the tax. It appears, as in *Colville*, that the Code imposes a tax on the first constitutionally taxable distribution . . . in this case, the use or consumption of the cigarettes [by the purchaser]."
>
> Appendix B, 15-16.

In determining that the California statutory provisions did not constitute a mandatory "pass-through" of taxability from the tribe to user/consumer, the Court of Appeals referenced the provisions of Washington revised code section 82.24.080, cited above, which

require that the tax be imposed "at the time and place of the first taxable event occurring within this state." Finding no similarly explicit "pass-through" language in the California statutory scheme, the Court of Appeals held that the incidence of the California tax was upon the tribe and that section 30108 was not effective to impose the burden of collecting the tax from the purchase upon the tribe. In drawing such distinction, the Court of Appeals has determined that the Washington statute effectively shifted the tax to the first constitutionally permissible event and that the California statutory scheme does not. The language of the two state statutory schemes does not justify such an interpretation or conclusion.

Interpreted literally, both the Washington and California tax schemes impose the tax upon the first *taxable event* which, in the case of a sale and corresponding purchase, is the sale. Neither statutory scheme makes any express reference to the first taxable event being the first event with respect to which imposition of the tax is constitutionally permissible. Both the trial court and this Court in the *Confederated Tribes* case reasonably interpreted the alternate taxability provisions of the Washington statute to impose the tax upon the first constitutionally permissible event and to pass the tax through a non-constitutionally taxable event to the first event which was constitutionally taxable. This logic applies equally to a reasonable interpretation of the California statutory provisions.

**2. An Indian Tribe Which Seeks Declaratory and Injunctive Relief Against Enforcement of a State Tax Should not be Permitted to Bar a State Counterclaim for Collection of the Tax on the Grounds of Tribal Sovereign Immunity.**

Petitioners acknowledge the existence of established case law authority which supports the proposition that an Indian tribe is generally immune from unconsented suits. See *e.g., United States v. Wheeler,* 435 U.S. 313, 322-23 (1978). Petitioners are equally aware that federal sovereign immunity has been held to bar countersuits against the sovereign. *United States v. U.S. Fidelity & Guaranty Co.,* 309 U.S. 506, 512-13 (1940). Petitioners nevertheless contend that reexamination of such general principles is



appropriate in light of the result of their application under the unique circumstances of the instant case.

In this case, we address the conflicting interests and rights of two sovereigns. The Tribe has elected to invoke the jurisdiction of the federal courts to challenge the constitutional validity and to enjoin enforcement of a State tax. Acting on the premise that its tax is valid, and pursuant to the mandatory provisions of Rule 13(a) of the Federal Rules of Civil Procedure, the sovereign State of California filed a counterclaim seeking judgment for the amount of taxes allegedly owed by the Tribe pursuant to the statutes the validity of which was the subject ot the original action.

A tribal entity is not the sovereign equivalent of the United States. Rather, tribes are " . . . regarded as having a semi-independent position . . . ; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, . . . " (*McClanahan v. Arizona State Tax Comm'n., supra,* at p. 173.)

Imposition of tribal sovereign immunity as an absolute bar to the counterclaim under the circumstances of the instant case compels anomalous results. Although the Tribe, with its limited sovereignty, was permitted to seek and obtain a judicial determination of the validity of State law, the Board and officials of the sovereign State of California were barred from obtaining an enforceable adjudication of their corresponding right to collect tax revenues although this issue was presented by the Tribe. This presents the further anomaly that, although the trial court held that the State tax was valid, Petitioner counterclaimants are left without the ability to judicially enforce their rights against the Tribe as determined by the trial court. Notwithstanding judgment in their favor, Petitioners are left with only the non-judicial enforcement remedies which they possessed prior to the suit and judgment. See *Washington v. Confederated Tribes, supra,* pp. 161-62.

In summary, if affirmed in their entirety, the decisions of the trial court and Court of Appeals have the effect of permitting the

Tribe to challenge the validity of State law and, having been unsuccessful in the challenge, being permitted to ignore the adverse judgment. Such an illogical result should neither be condoned nor permitted by this Court.

## CONCLUSION

In light of the similarity of the alternate taxing provisions of the Washington and California cigarette tax laws, and pursuant to the decision of this Court in the *Confederated Tribes* case, the California Legislature must be deemed to have intended and provided that the incidence of California cigarette tax be "passed through" to and imposed upon the first constitutionally permissible taxable event: use or consumption by non-Indian purchasers. Pursuant to the decisions in the *Moe* and *Confederated Tribes* cases, it is appropriate to compel the tribe to collect the tax from such purchasers and remit it to State taxing authorities. Having sought adjudication of the validity of a State tax, an Indian Tribe should not be permitted to bar a counterclaim by the State for taxes due on the ground of tribal sovereign immunity. The petition for writ of certiorari should be granted.

July 29, 1985

Respectfully submitted,

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## Appendix A

UNITED STATES COURT OF APPEALS
No. 83-2431
D.C. NO. 77-2838-RFP
FOR THE NINTH CIRCUIT

The Chemehuevi Indian Tribe,
Plaintiff-Appellant,

vs.

California State Board of Equalization; George R. Reilly; Iris Stankey; William M. Bennett; Richard Nevins; Kenneth Cory; individually and in their official capacities as members of the California State Board of Equalization; Bank of America; N.T. & S.A., a national banking association; and David Cordier, individually and in his capacity as employee of the California State Board of Equalization;
Defendants-Appellees.

The Chemehuevi Indian Tribe,
Plaintiff-Appellee,

vs.

California State Board of Equalization; Reilly, George R.; Stankey, Iris; Bennett, William M.; Nevins, Richard; & Cory, Kenneth; individually & in their official capacities as members of the California State Board of Equalization,
Defendants-Appellants.

[Filed Apr. 12, 1985]
Appeal from the United States District Court
for the Northern District of California

OPINION

Honorable Robert F. Peckham, District Judge, Presiding
Argued and Submitted July 9, 1984

Before: PHILLIPS,* FLETCHER, and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

The Chemehuevi Indian Tribe ("Tribe") brought suit in the district court challenging the validity of California's cigarette tax as applied to cigarettes sold by the Tribe on the reservation to non-Indian purchasers, and requesting injunctive relief to prevent the California State Board of Equalization ("Board") from enforcing the California Cigarette Tax Law against it. In response, the Board filed a counterclaim for the amount of taxes allegedly due. We find that sovereign immunity bars the counterclaim and that the California statute is preempted by federal law because it imposes the state tax directly upon the Tribe.

## I. FACTUAL BACKGROUND

Since time immemorial, the Chemehuevi Indian Tribe[1] has resided in the Chemehuevi Valley desert along the Colorado River, in the area that is now part of the Chemehuevi Indian Reservation. The Reservation is adjacent to Lake Havasu in the State of California, and the Tribe operates a resort, including a marina, a restaurant, and retail stores on land within the Reservation. As part of this business activity, the Tribe sells cigarettes that it purchases from a wholesaler in Arizona. During the first two years it operated its resort, the Tribe remitted to the California State Board of Equalization the state tax imposed on the distribution of cigarettes. In 1977, in an effort to raise revenues, the Tribe lawfully enacted its own Business and Cigarette Tax

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* Hon. Harry Phillips, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

[1] The Chemehuevi Indian Tribe is a federally-recognized Indian tribe, organized under section 16 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. § 476 (1982), and governed by a Tribal Council that is recognized by the United States through the Secretary of the Interior.



Code.[2] As part of this Code, the Tribe imposed a tribal cigarette tax equivalent to the state cigarette tax. The Tribe then ceased remitting to the Board the state cigarette tax.

Following these actions by the Tribe, the Board notified the Bank of America that the Tribe was delinquent in the payment of taxes due to the state. Pursuant to the Board's request, the bank notified the Tribe that it was restricting the release of monies in the Tribe's checking and savings accounts. The Board then recorded liens against Tribal property and assets and attempted to execute on the liens. In response, the Tribe filed this action to enjoin the Board from enforcing its Cigarette Tax Law against the Tribe and the Board counterclaimed for the amount of taxes it alleged was due.

## II. TRIBAL SOVEREIGN IMMUNITY

Because of its status as a sovereign entity, *see, e.g., United States v. Wheeler*, 435 U.S. 313, 322-23 (1978), an Indian tribe is generally immune from unconsented suits. "The common law immunity of [Indian tribes] is coextensive with that of the United States . . . ." *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)); *accord Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983); *California ex rel. California Department of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979).[3] This immunity is rooted in the unique relationship between the United States government and the Indian tribes, whose sovereignty substantially predates the Constitution. *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981). Such immunity is necessary to preserve the autonomous political existence of the tribes, *id.*,

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[2] In 1976, pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (1982), the Tribe adopted a lawful constitution that vests it with the power to levy taxes and all powers necessary to promote the welfare of its people.

[3] Like the sovereign immunity of the United States, a tribe's immunity is subject to Congress' plenary control, *Kennerly*, 721 F.2d at 1258, or waiver by the tribe itself, *Wheeler*, 435 U.S. at 323.

and to preserve tribal assets, *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966); *Adams v. Murphy*, 165 F. 304, 308-09 (8th Cir. 1908).[4] *See generally* Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982) (demonstrating that the federal policies of tribal self-determination, economic development, and cultural autonomy require tribal immunity from suit).

The question of tribal sovereign immunity is jurisdictional in nature. *See Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 173 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940). Accordingly, we must address it first and resolve it irrespective of the merits of the claim. *See Rehner*, 678 F.2d at 1351; *Quechan Tribe*, 595 F.2d at 1154. In the face of voluminous precedent to the contrary, the Board contends that tribal sovereign immunity does not bar its counterclaim against the Tribe. The Board suggests both that a number of this court's recent cases present a basis for bringing suit against Indian tribes, and that counterclaims brought under Rule 13(a) of the Federal Rules of Civil Procedure are distinguishable from direct suits. We disagree.

A. *Immunity From Unconsented Suit*

The Board contends that recent decisions by this court in cases in which the issue of sovereign immunity of tribal officials was raised undermine the precedential value of our more general statements about the immunity of tribes. According to the Board, these cases suggest that tribal sovereign immunity may not be an absolute jurisdictional bar to all actions against Indian tribes.

The Supreme Court has recently reiterated the analytic distinction between suits against a sovereign entity and those brought against the officers or employees of the sovereign. Absent consent, a suit against a sovereign entity is barred; it is only when the plaintiff nominally sues an official that a more thorough examination of the sovereign status of the defendant must be made. *See*

[4] Because of their more limited revenue bases, Indian tribes would find the lost assets more difficult to replace than would other governmental bodies. *Atkinson v. Haldane*, 569 P.2d 151, 169 (Alaska 1977).



*Pennhurst State School & Hospital v. Halderman*, ___ U.S. ___, 104 S. Ct. 900, 908 (1984) (discussing sovereign immunity of states). If the official's acts exceeded the authority granted by the sovereign, as when an officer has acted unconstitutionally, the suit is deemed to be against the officer in his or her individual capacity. Because the suit is thus not against the sovereign, it is not barred. *See id.* at 909 (citing *Ex parte Young*, 209 U.S. 123 (1908)); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949).[5]

The same principles have been applied consistently when suit is brought against an Indian tribe. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 58-59 (citing *Ex parte Young* and permitting suit against tribal officer while holding that sovereign immunity bars suit against tribes; *Kennerly*, 721 F.2d at 1258-59. Yet, the Board suggests that some of our recent cases—*Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982), *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1707 (1984), and *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2655 (1984)—have deviated from the established analytic model.

In *Cardin*, the district court had granted a non-Indian's request for an injunction prohibiting tribal officials from enforcing tribal health regulations against him. The Board finds support for its contention that tribes may be sued in the fact that we did not discuss the issue of tribal immunity when we reversed the district court's order. We do not see how our failure to discuss the tribe's sovereign immunity when holding that an injunction against tribal officials was invalid suggests a retreat from a consistent line of precedent holding that tribes are immune from suit.

The same is true of *Babbitt Ford*. There, the district court reaffirmed the notion that the sovereign immunity enjoyed by

[5] For suit against an official to be permissible, the plaintiff also must not request retroactive relief that would require the disbursement of public funds. *See Pennhurst*, ___ U.S. at ___, 104 S. Ct. at 909 (citing *Edelman v. Jordan*, 415 U.S. 651, 664-66 (1974)); *Larson*, 337 U.S. at 691 n.11; *Land v. Dollar*, 330 U.S. 731, 738 (1947).

Indian tribes can be limited only by explicit tribal consent or congressional authorization. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 519 F. Supp. 418, 424 (D. Ariz. 1981) (citing *Santa Clara Pueblo*, 436 U.S. at 58); *see infra* p. 9. The court said that "the sole question is whether sovereign immunity bars plaintiffs from suing the Tribe indirectly through its officers." 519 F. Supp. at 424. Thus, the court considered the circumstances under which suits could be brought against tribal officers. It did not consider the question of direct suits against Indian tribes, or suggest in any way that we were abandoning the historic rule that precludes such suits. Rather, the court held that some of the acts of particular tribal officials were within their authority while some were not, and that an injunction against the officers regarding only the latter acts was appropriate. *Id.* at 434. On appeal we concluded that all of the acts were within the sovereign authority of the tribe's officers, and reversed the grant of injunctive relief. *Babbit Ford*, 710 F.2d at 590.

The Board relies, as well, on some statements regarding the nature of sovereign immunity contained in *Snow*. *Snow* held that tribal sovereign immunity barred an action by non-Indian business owners challenging a tribal business tax. Although unnecessary to its holding, the *Snow* panel suggested a mode of analysis for tribal immunity cases that, if taken literally, would eliminate the important distinction between suits brought directly against a sovereign entity and suits against officers and employees of the sovereign. The *Snow* court correctly noted that Indian tribes are immune from suit, 709 F.2d at 1321, that Congress or the tribe may waive this immunity, *id.*, and that this immunity "extends to tribal officials acting in their representative capacity and within the scope of their authority," *id.* But in asserting that "tribal immunity is not a bar to actions which allege conduct that is determined to be outside the scope of a tribe's sovereign powers," *id.* (footnote omitted), the *Snow* court apparently inadvertently portrayed the *Ex parte Young/Larson* test as extending to the tribe itself. It has long been the rule that *Ex parte Young* and *Larson* are applicable only in the case of suits against officials, where the inquiry is whether an official is protected by the immunity of the sovereign. We reiterate that rule here: in the case of suits against a tribe the *Ex parte Young/Larson* test is not



applicable. The tribe remains immune from suit regardless of any allegation that it acted beyond its authority or outside of its powers.

Because the Board's counterclaim has been brought directly against the Chemehuevi Tribe, not against a tribal official, we need not examine either the authority for the acts upon which the claim is brought or the type of relief sought. The district court properly concluded that sovereign immunity bars the Board's claim.[6]

### B. Implied Waivers of Immunity

Like the United States, an Indian tribe can consent to suit, but "such consent must be unequivocally indicated." *Rehner*, 678 F.2d at 1351 (citing *Santa Clara Pueblo*, 436 U.S. at 59-60); *cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (tribe's sovereign power remains intact "unless surrendered in unmistakable terms").[7] The United States does not implicitly waive its immunity by instituting an action in which a defendant asserts a counterclaim. *See, e.g., United States v. City of Los Angeles*, 595 F.2d 1386, 1389 (9th Cir. 1979). Nor does an Indian

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[6] We reject the Board's contention that the absence of judicially enforceable remedies shoud lead to a relaxation of the sovereign immunity bar in a case of this sort. It is unclear if judicially sanctioned "self-help," such as seizing goods in transit to the reservation, *see Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161-62 (1980), is in fact less effective than judicial remedies. But more significantly, sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation. *Quechan Tribe*, 595 F.2d at 1155.

[7] Entry into a suit may constitute express consent, as it did in *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981), but only if, when entering into the suit, the Tribe explicitly consents to be bound by the resolution of the dispute ordered by the court. *See id.* at 1015-16 (discussing consent to equitable resolution in a suit analagous to an *in rem* action, and distinguishing that situation from the case in which a party seeks to assert a compulsory counterclaim against a tribe); *cf. Snow*, 709 F.2d at 1321 (post-*Oregon* case noting that consent must be unequivocally expressed).

tribe. *United States Fidelity & Guaranty Co.*, 309 U.S. at 513; *Rehner*, 678 F.2d at 1351; *see also Quechan Tribe*, 595 F.2d at 1155 ("The fact that it is the State which has initiated suit is irrelevant insofar as the Tribe's sovereign immunity is concerned.").[8] The Chemehuevi Tribe's initiation of a suit for declaratory and injunctive relief does not constitute consent to the Board's counterclaim.

Moreover, despite the Board's argument, the compulsory counterclaim requirement of Rule 13(a) of the Federal Rules of Civil Procedure cannot be viewed as a congressional waiver of the Tribe's immunity. *Cf. United States v. Longo*, 464 F.2d 913, 916 (8th Cir. 1972) (Rule 13(a) is not a congressional waiver of the United States' immunity from compulsory counterclaims). We have previously rejected the contention that congressional enactments unrelated to immunity may implicitly grant authority to bring suit against Indian tribes. *See Rehner*, 678 F.2d at 1351 (statute governing Indian liquor licenses); *Quechan Tribe*, 595 F.2d at 1155 (Declaratory Judgment Act). Congress, no less than a tribe itself, cannot imply a waiver of sovereign immunity but must "unequivocally" express it. *Santa Clara Pueblo*, 436 U.S. at 58; *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 285 (1973).

Furthermore, Rule 13(a) is explicitly intended to require joinder of only those claims that might otherwise be brought separately. The authorizing statute for the Federal Rules of Civil Procedure specifies that the rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (1982). We cannot find that a rule promulgated pursuant to this statute was intended impermissibly to abridge the Indian tribes' substantive right to immunity from suit. Nor can we read Rule 13(a) in isolation and extend federal jurisdiction despite the repeated

[8] Both the Supreme Court and this court have noted that any benefits that might be incurred by resolving all aspects of a case at once are irrelevant when the absolute bar of sovereign immunity is at issue. *See United States Fidelity & Guaranty*, 309 U.S. at 513; *Quechan Tribe*, 595 F.2d at 1155.



specification that the rules are not intended to have such an effect. *See* Fed. R. Civ. P. 82; advisory committee note 5 to Fed. R. Civ. P. 13. Accordingly, we affirm the district court's dismissal of the Board's counterclaim against the Tribe.

## III. APPLICABILITY AND LEGALITY OF THE CALIFORNIA CIGARETTE TAX

There is no dispute between the parties that, in the absence of express congresssional authorization, direct state taxation of tribal property or the income of reservation Indians is preempted by the applicable federal law that creates the reservation. *See Bryan v. Itasca County*, 426 U.S. 373, 376-77 (1976); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-82 (1976); *McClanahan v. State Tax Commission*, 411 U.S. 164, 179-81 (1973). However, when a state requires that a tax be passed on to the purchaser and collected by the seller, the legal incidence of the tax falls upon the purchaser. *United States v. Tax Commission*, 421 U.S. 599, 608 (1975). If the incidence of a tax falls upon non-Indian purchasers, the tax may, in some cases, be permissible. *See, e.g., Moe*, 425 U.S. at 483; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151 (1980).

The district court determined that the Chemehuevi Tribe is a "person," as defined by section 30010 of the Revenue & Taxation Code, Cal. Rev. & Tax Code § 30010 (West 1979), and may thus be a "distributor," as defined by section 30011 of the same code.[9] Distributors may be subject to the tax authorized by section 30101 of the Code or the collecting requirements specified in section 30108 of the Code. The court then determined that section 30108 is a "pass-through" provision that shifts the incidence of the tax from the cigarette seller, if that entity cannot permissibly be taxed, to the next legally taxable entity, in this case the non-Indian purchasers.

Under the district court's interpretation of the California statutes, the Tribe is required by section 30108 to collect the cigarette

[9] The relevant California statutes are quoted in the Appendix.

tax from the purchasers and remit it to the State Board. In our *de novo* review of the district court's determination of California state law, *see In re McLinn*, 744 F.2d 677, 680 (9th Cir. 1984) (en banc), we agree that the Tribe is a "person" and thus a distributor for purposes of the California cigarette tax. We find, however, that the incidence of the tax falls upon the Tribe and that the tax is this impermissible.

A. *Definition of the Term "Person"*

"[I]n common usage, the term 'person' does not include the sovereign [and] statutes employing the phrase are ordinarily construed to exclude it." *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941) (footnote omitted); *accord Dollar Savings Bank v. United States*, 86 U.S. (19 Wall.) 227, 239 (1873). But when a legislative body has made a general grant of authority and has neither explicitly created a particular exception nor otherwise indicated an intent to do so, we will not imply an exception. *See Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980); *Aqua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1186-87 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972); *see generally United States v. Rice*, 327 U.S. 742, 752-53 (1946) (mechanical rules of construction not to be used when statutory language and purpose are clear).

The California Revenue & Taxation Code defines "person" by an inclusive list of examples. The definitional term used in section 30010—"includes"—is one of enlargement, not of limitation. *See Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *American Federation of Television & Radio Artists, Washington-Baltimore Local v. NLRB*, 462 F.2d 887, 889-90 (D.C. Cir. 1972). Among the entities that the section denotes as being within its definition of "person" is "any other group or combination acting as a unit." An Indian tribe, of course, is not a mere "group" or "unit" comprised of individuals. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). Rather, an Indian tribe has a specific legal indentity as a unique governmental entity; it is a domestic nation, a distinct political community that exercises powers of independence and self-government. *Id.* at



140-41; *Worchester v. Georgia*, 30 U.S. (6 Pet.) 515, 559 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-20 (1831); Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1069-1070 (1982); *cf. State of Washington, Department of Ecology v. United States Environmental Protection Agency*, No. 83-7763, slip op. at 11 (9th Cir. Feb. 6, 1985) ("Respect for the long traditional of tribal sovereignty and self-government also underlies the rule that state jurisdiction over Indians in Indian country will not be easily implied."). But this unique identity does not diminish its categorization as a "group" or "unit." In fact, it is to the Tribe as a distinct unit, not to its individual members, that its sovereign identity attaches. *See Talton v. Mayes*, 163 U.S. 376, 382-84 (1896).[10]

Unless the words are to be treated as surplus language, the general phrase "or any other group or combination acting as a unit" must be interpreted to include more than those groups specifically enumerated in the statute. *See Mid-Northern Oil Co. v. Walker*, 268 U.S. 45,49-50 (1925) (rule for construing general terms that follow comprehensive enumeration in a statute); *United States v. Mescall*, 215 U.S. 26, 31-32 (1909) (same). The unquestionable purpose of this last phrase of section 30010 is to bring within the scope of the term "person" any entity not specifically noted in the inclusive definitional list. We thus find that the Chemehuevi Tribe cannot avoid liability under the provisions of the Cigarette Tax Law based on that law's definition of "person."

B. *The Legal Incidence of the Tax*

The Supreme Court recently considered the legal incidence of a state tax on the distribution of cigarettes by Indian tribes. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). The Court applied the principle that

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[10] The Tribe relies on *United States v. Cooper Corp.*, 312 U.S. 600 (1941), in asserting that its sovereign status precludes its inclusion in the term "person." But the sovereign at issue in *Cooper* was the United States; Indian tribes retain a sovereinty that is of a "unique and limited" character. *Wheeler*, 435 U.S. at 323.

when a statute requires that a sales tax be passed on to the purchaser and collected by the vendor, the legal incidence falls upon the purchaser. It concluded that the incidence of Washington's state cigarette tax fell upon the non-Indian purchasers, *id.* at 142 n.9, and that the collection burden imposed upon the Tribe was minimal and therefore permissible, *id.* at 159. The district court in the instant case determined that the California cigarette tax statutes operate in a manner analogous to the Washington statutes. We disagree.

In general, the California cigarette tax is imposed by section 30101 of the Revenue & Taxation Code on "distributors," those entities that sell untaxed cigarettes within the state and those that use or consume untaxed cigarettes within the state. *See* Cal. Rev. & Tax. Code §§ 30008, 30011 (West 1979). The district court determined that, in situations in which the vendor is not subject to the tax, section 30108(a) of the Code, like the Washington statute at issue in *Colville*, acts as a mandatory "pass-through" provision that imposes the tax on purchasers. We find the two statutes to be quite different.

The Washington statute explicitly notes the legislature's intent to levy a tax on all taxable items distributed or consumed within the state, and equally explicitly requires that the tax be imposed "at the time and place of the first taxable event occurring within this state." Wash. Rev. Code § 82.24.080 (1981). In contrast, as the Board concedes, the California statute does not contain any similarly explicit "pass-through" language.

The Board therefore asks us to analogize the California Cigarette Tax to the California Sales & Use Tax, Cal. Rev. & Tax. Code §§ 6201-6207 (West 1970 & Supp. 1984), and to examine the regulations it has promulgated pursuant to the latter statute for guidance in interpreting the former. The Board argues that the references to sales by Indian tribes in its Sales & Use Tax regulations, Cal. Admin. Code tit. 18, § 1616(d) (1978), demonstrate the legislature's intent to pass the cigarette tax on to consumers.



We cannot determine legislative intent in this fashion.[11] First, the Sales & Use Tax and the Cigarette Tax are independent statutes and have been interpreted by the Board through distinct sets of regulations. In contrast to the regulations interpreting the Sales & Use Tax, the Board's regulations relating to the Cigarette Tax fail to discuss sales by Indian tribes. *See* Cal. Admin. Code tit. 18, §§ 4018-4099 (1983). The Board's attempted analogy is thus unpersuasive.

Second, it is the legislature's intent, not the Board's, that we must ascertain. The Board's interpretation of the statute may guide us, *see Miller v. Youakim*, 440 U.S. 125, 144 (1979); *Walker v. Navajo-Hopi Indian Relocation Commission*, 728 F.2d 1276, 1278 (9th Cir.), *cert. denied*, 105 S.Ct. 298 (1984), but it cannot substitute for our independent determination of whether the legislature intended section 30108(a) to be a pass-through provision, *see Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Grunfeder v. Heckler*, 748 F.2d 503, 505 (9th Cir. 1984); *California Cartage Co. v. United States*, 721 F.2d 1199, 1202 (9th Cir. 1983), *cert. denied sub nom. International Longshoremen's and Warehousemen's Union v. United States*, 105 S.Ct. 110 (1984). In the absence of legislative history or clarifying state court interpretations, the language of the statute " 'must ordinarily be regarded as conclusive.' " *Bread Political Action Committee v. Federal Election Committee*, 455 U.S. 577, 580-81 (1982) (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *accord Tulalip Tribes v. Federal Energy Regulatory Commission*, 732 F.2d 1451, 1454 (9th Cir. 1984).

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[11] In light of the sovereign status of Indian tribes, *see Wheeler*, 435 U.S. at 322-23; *Talton v. Mayes*, 163 U.S. at 382-84, and the state's lack of authority to tax tribes, *see supra* p. 11, legislative intent to impose even a collection burden should be explicitly stated. *Cf. Merrion*, 455 U.S. at 149 (" '[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.' ") (quoting *Santa Clara Pueblo*, 436 U.S. at 60); *State of Washington, Department of Ecology v. United States Environmental Protection Agency*, No. 83-7763, slip op. at 11 (9th Cir. Feb. 6, 1985).

Upon careful examination, it is apparent that section 30108(a) is merely a procedural section that denotes the manner in which a vendor shall collect a tax from a purchaser if and when the purchaser is obligated to pay the tax. In the case of a sale with respect to which "the [usual cigarette] tax imposed by Section 30101 is inapplicable," the vendor is required to collect the tax from the purchaser either (a) at the time of sale, if the purchaser is then obligated to pay the tax, or (b) if the purchaser is not then obligated to pay the tax, at the time the purchaser becomes so obligated. Cal. Rev. & Tax. Code ¶ 30108(a) (West 1979). Collection by the vendor is mandatory, but only if and when the purchaser has a tax obligation. The section does not contain any substantive provisions that themselves impose any tax or that indicate when section 30101 is inapplicable.[12] Nor does it specify under which situations a purchaser is obligated to pay the tax at the time of sale or, if the purchaser is not then obligated, when the purchaser becomes so obligated. We find no language in section 30108—the only section on which the Board relies for its argument that the incidence of the tax falls upon the purchaser[13]—that remotely suggests a legislative intent to have the purchaser pay the tax whenever the vendor is a non-taxable entity.

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[12] Cal. Rev. Tax. Code §§ 30102, 30102.5, 30103, 30104, 30105.5, and 30106 (West 1979 & Supp. 1984) specify a number of transactions to which the tax imposed by section 30101 "shall not apply." None of these exceptions refers to sales by Indian tribes and the Board does not argue that any of these sections is relevant to this case. The Tribe argues that section 30101 is therefore not "inapplicable" for purposes of triggering section 30108. The Board, in opposition, argues that section 30108 is effective whenever section 30101 cannot apply—whether the inapplicability is determined by the "exceptions" sections of the Cal. Rev. & Tax. Code or by some overriding federal mandate.

We need not resolve when section 30101 is "inapplicable." Regardless when section 30108 is triggered, it does not authorize a tax; it merely specifies the procedures for collecting a tax, if that tax is authorized elsewhere.

[13] The Board explicitly argues that section 30108 alone, as a pass-through provision, obligates the consumer to pay the tax when purchasing cigarettes from in-state Indian tribes. As noted in the text, we disagree. The Tribe argues further that even section 30107 and section



The state cannot tax the income of the Chemehuevi Indians. *See, e.g., Itasca County*, 426 U.S. at 376-77. Because we have determined that section 30108 does not shift the incidence of the California Cigarette Tax to the consumer and that the tax is therefore unlawful, we need not resolve whether federal statutes and policies would preempt a similar tax the incidence of which fell upon the non-Indian cigarette purchasers.

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30108 in combination do not impose the tax on consumers. We agree with the Tribe's reading of section 30107.

Section 30107, when read in conjunction with section 30008, specifies that "taxes resulting from [the use or consumption of untaxed cigarettes in this state] shall be paid by the user or consumer." Thus, if we were to look only at the language of section 30107, we might conclude that the section imposes on consumers the tax for all previously untaxed cigarettes. But, in its regulations, the Board has narrowed the applicability of this section of the statute. The regulations interpreting sections 30107 and 30108 require that a consumer pay the tax for the "use or consumption" of "untaxed cigarettes" (tautologically defined in sections 30005 and 30009), only when (1) cigarettes are purchased by a consumer out of state and shipped to within California, (2) cigarettes are purchased by a consumer, in quantities of more than 400 cigarettes in a single lot, and brought into the state by the consumer, or (3) cigarettes are purchased by a consumer in quantities of more than 400 cigarettes in a single lot, from a federal instrumentality that the "exceptions" sections, *see supra* note 7, exclude from the tax on distributors. Cal. Admin. Code tit. 18, ¶ 4091 (1972). The purchase of previously untaxed cigarettes from in-state Indian tribes clearly does not fall within any one of these categories.

Moreover, if the purchase of cigarettes from in-state Indian tribes were suddenly added as a fourth category under section 4091 of the regulation, or if section 30107 of the statute were interpreted to impose a tax on purchasers for the consumption of these cigarettes, cigarette sales by in-state Indian tribes would be the only transactions in which purchasers who buy and transport their own cigarettes would be required to pay the tax on purchases of less than two cartons of cigarettes. Although we need not resolve the issue on this appeal, we note that it is not clear that such a tax could withstand constitutional scrutiny.

## IV. CONCLUSION

The district court properly dismissed the counterclaim against the Chemehuevi Tribe. Because the California statute impermissibly imposes the cigarette tax burden on the Tribe, the district court erred in denying the Tribe's request for declaratory and injunctive relief. We therefore reverse the district court's order and remand for appropriate relief.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED



## APPENDIX

California Revenue & Taxation Code (West 1979)

§ 30005. Untaxed cigarette

"Untaxed cigarette" means any cigarette which has not yet been distributed in such manner as to result in a tax liability under this part.

§ 30008. Distribution

"Distribution" includes:

(a) The sale of untaxed cigarettes in this state.

(b) The use or consumption of untaxed cigarettes in this state.

(c) The placing in this state of untaxed cigarettes in a vending machine or in retail stock for the purpose of selling the cigarettes to consumers.

§ 30009. Use or consumption

"Use or consumption" includes the exercise of any right or power over cigarettes incident to the ownership thereof, other than the sale of the cigarettes or the keeping or retention thereof for the purpose of sale.

§ 30010. Person

"Person" includes any individual, firm, copartnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, this State, any county, city and county, municipality, district, or other political subdivision of the State, or any other group or combination acting as a unit.

§ 30011. Distributor

"Distributor" includes:

(a) Every person who, after 4 o'clock a. m. on July 1, 1959, and within the meaning of the term "distribution" as defined in this chapter, distributes cigarettes.

(b) Every person who sells or accepts orders for cigarettes which are to be transported from a point outside this State to a consumer within this State.

§ 30101. Rate

Every distributor shall pay a tax upon his distributions of cigarettes at the rate of one and one-half mills ($0.0015) for the distribution after 4 o'clock a. m. on July 1, 1959, of each cigarette until 12:01 o'clock a. m. on August 1, 1967, and at the rate of three and one-half mills ($0.0035) for the distribution of each cigarette on and after August 1, 1967, until 12:01 o'clock a. m. on October 1, 1967, and at the rate of five mills ($0.005) on and after 12:01 o'clock a. m. on October 1, 1967.

§ 30107. User or consumer liable for tax

The taxes resulting from a distribution of cigarettes within the meaning of subdivision (b) of Section 30008 shall be paid by the user or consumer.

§ 30108. Collection of tax; receipt; "engaged in business in state" defined; taxes as debt owed

(a) Every distributor engaged in business in this state and selling or accepting orders for cigarettes with respect to the sale of which the tax imposed by Section 30101 is inapplicable shall, at the time of making the sale or accepting the order or, if the purchaser is not then obligated to pay the tax with respect to his distribution of the cigarettes, at the time the purchaser becomes so obligated, collect the tax from the purchaser, if the purchaser is other than a licensed distributor, and shall give to the purchaser a receipt therefor in the manner and form prescribed by the board.

(b) ...



## Appendix B

In The United States District Court
for the Northern District of California
No. C-77-2838 RFP
Chemehuevi Indian Tribe,
Plaintiff,

v.

State Board of Equalization, et al.,
Defendant.
[Filed Sep. 15, 1983]

JUDGMENT

The court having ruled in its memorandum and order dated September 15, 1983, that plaintiff's request for injunctive relief be denied,

IT IS HEREBY ORDERED that judgment be entered in favor of defendants.

Dated: September 15, 1983

/s/ Robert Peckham
Chief United States District Judge

In the United States District Court
for the Northern District of California
No. C-77-2838 RFP

Chemehuevi Indian Tribe,
Plaintiff,

v.

State Board of Equalization, et al.,
Defendants.

[Filed Sept. 15, 1983]

Memorandum and Order

## I. INTRODUCTION

In this action, the Chemehuevi Indian Tribe seeks injunctive relief, prohibiting the California State Board of Equalization from attempting to enforce the provisions of the California Cigarette Tax Law, Revenue and Taxation Code § 30001 *et seq.*,[1] against the Tribe. The Tribe further seeks a declaration from this court that any attempts by the Board to enforce its Cigarette Tax Law against the Tribe or against non-members of the Tribe who purchase cigarettes on the Reservation are 1) impermissible in that the Tribe is not a "person" within the meaning of the Tax Law; 2) violative of the Indian Commerce Clause in that the legal incidence of the Tax Law falls on the Tribe; 3) preempted by federal statutes, regulations and policies promoting tribal self-government and tribal economic self-sufficiency on the Reservation; 4) impermissibly interferes with tribal self-government; 5) violative of the Indian Commerce Clause in that the imposition of the tax upon sales of cigarettes by the Tribe to non-Indians on the Reservation imposes a multiple tax burden which discriminates against Indian commerce.

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[1] *See* sections 30003, 30005, and 30013.



## II. PROCEDURAL BACKGROUND

The Tribe filed its Complaint for declaratory and injunctive relief on December 15, 1977. The Board had previously determined that the Tribe owed to the state amounts totalling $11,702.95 for taxes the Tribe allegedly should have collected from non-Indian purchasers of cigarettes on the Reservation, including interest and penalties on the taxes owed. The Board then issued a "withhold notice" asking that the Bank of America to withhold from the Tribe's funds twice the amount of the claimed delinquency. It also recorded liens against all tribal property and assets located in San Bernadino and Los Angeles counties, including property held in trust for the Tribe by the United States, and had a warrant issued to the sheriff of Los Angeles county directing him to seize and sell such tribal assets as might be necessary to satisfy the claimed liens. After the Tribe filed its Complaint, the Board filed a counter-claim for the amount of the taxes allegedly owing from the Tribe.

The court granted a preliminary injunction on January 19, 1978, prohibiting the Board from collecting any taxes, past or future, from the Tribe and ordering the Tribe to pay into an escrow account the approximate tax that would be collected from non-Indians, if the California Cigarette Tax Law were to be applied.

The Tribe by its Complaint initially sought monetary damages from the state. However, the Tribe's claim for general and exemplary damages was dismissed with prejudice by stipulation of the parties and approved by the court on March 2, 1979.

Following a trial on stipulated facts, the court vacated the submission by order of July 9, 1979, to await the Supreme Court's decision in *Confederated Tribes of Colville v. Washington*. The court simultaneously modified the preliminary injunction to relieve the Tribe of the obligation to make further deposits into the escrow account pending the outcome of this litigation.

On October 5, 1979, the Tribe filed a motion to reconsider and amend the court's order of July 19, asking either that judgment be entered in favor of the Tribe on the ground that it was not a "person" within the meaning of the Cigarette Tax Law, and that

the law was therefore not applicable to its cigarette sales, or, in the alternative, that the Board's counter-claim be dismissed and the funds in the escrow account be released to the Tribe on the ground that the Tribe, as a sovereign, was immune from unconsented suit. On December 12, 1979, this court held that the Tribe's claim of sovereign immunity was well-founded and ordered that the funds that were held in the escrow account be released to the Tribe.

The Tribe's request for injunctive and declaratory relief on the above issues is the only claim presently before this court. Trial on said claim is based upon a stipulated record. The parties filed a Stipulation of Facts on March 4, 1979, a Supplemental Stipulation of Facts on November 12, 1982, and a Stipulation certifying certain documents and pleadings for the record on February 8, 1983.

## III. FINDINGS OF FACT

The Chemehuevi Indian Tribe is a federally-recognized Indian tribe. The governing body of the Tribe is the Tribal Council which is recognized by the United States government through the Secretary of the Interior. The Tribe is the beneficial owner of the Chemehuevi Indian Reservation, comprising approximately 32,000 acres of land; legal title is held in trust by the United States for the benefit of the Tribe. The Tribe is composed of approximately 446 enrolled members, 75 of which currently reside on the Reservation. The remaining pertinent population of the Reservation is composed of approximately 870 non-tribal members (Indian and non-Indian). Of the 447 enrolled members of the Tribe, approximately 170 members reside outside the boundaries of the Reservation within the state of California. These members are eligible to receive all the public services that all state citizens and residents receive from the state, county and city of their residence.

The Reservation is adjacent to Lake Havasu and is located entirely within the state of California. It is situated in San Bernadino County, on the west shore of the Lake, approximately 50 miles by road from Blythe, California, and approximately 70 miles from Parker, Arizona. The shoreline of the Reservation is



approximately 4 miles by water from Lake Havasu City, Arizona. The road leading to the Reservation carries no through traffic to pints other than those on or immediately adjacent to the Reservation. The road leading to the Reservation and two miles of road within the Reservation are maintained by the County of San Bernadino. This road provides access to both Indian and non-Indians who work, reside or visit the Reservation.

The Tribe is organized under section 16 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. ¶ 476, 48 Stat. 987. In 1976, pursuant to the Indian Reorganization Act, the Tribe adopted a constitution which, as subsequently amended, was approved by the Secretary of Interior on April 21, 1977. Under that constitution, the Tribe is vested, *inter alia,* with the power to levy taxes and fees. Art. VI, Sec. 2(h).

The Tribe has enacted a Business and Cigarette Tax Code which regulates the sale of cigarettes, imposes a tribal cigarette tax and provides for the licensing of businesses within the exterior boundaries of the Reservation. On December 17, 1977, the Tribe enacted a detailed Tribal Retail Tobacco Outlets Ordinance which set forth the procedures for the operation of a cigarette outlet owned and operated by the Tribe and levied a tribal excise tax upon the purchase or possession by consumers of cigarettes and other tobacco products. On October 15, 1980, the Tribe enacted a new "Use and Cigarette Tax Ordinance" in order *inter alia,* fully to tax the on-reservation sales of cigarettes. The ordinance went into effect on January 1, 1981. The Tribe at present imposes a tribal tax which is the equivalent of the state cigarette tax.

In June of 1976, the Tribe sought and obtained from the United States Department of the Interior Revolving Loan Fund a loan in the amount of $1,200,000 for the purpose of purchasing the assets and facilities of Havasu Landing, Inc., a functioning commercial enterprise. Shortly thereafter, the Tribe purchased the Landing and began operating the business. At present, the Tribe conducts the following businesses within the Reservation: a grocery store, which includes a tribal retail tobacco outlet, a bar, a restaurant, a marina, a boathouse which includes a gas station, tackle shop, and a tribal retail tobacco outlet, a campground, a

motel, a wildlife program which includes the sale of fishing licenses, and a joint partnership for the retail sale of mobile homes.

In May of 1978, the Tribe sought and obtained under the provisions of the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*, a loan from the same Loan Fund in the amount of $1,000,000 for the purpose of constructing a mobilehome park within the Reservation.

Pursuant to 25 C.F.R. § 101.13, the Tribe gave, as security for its two loans, an assignment to the United States consisting of all the assets of both Havasu Landing and the mobilehome park now owned and hereafter acquired by the Tribe and all income which now and in the future becomes due to the Tribe from the operation of said enterprises. The Tribe further granted the United States the full right, power and authority, in its own name or in the name of the Tribe, to demand, collect or sue for said income of said enterprises as may be requested from time to time by the Area Director of the Phoenix Area Office, Bureau of Indian Affairs. Under the repayment terms of the promissory notes executed by the Tribe, the Tribe has obligated itself to make monthly payments of interest and, later, of principal.

Pursuant to the loan agreements and under the provisions of the Indian Financing Act, the United States Department of the Interior, Bureau of Indian Affairs, Colorado River Agency, Credit and Finance Branch, supervises the day-to-day operation of the Tribe's business enterprise, in that it: 1) approves the enterprise's budget; 2) approves all modifications thereof; 3) requires the enterprise to have a general plan of operation; 4) approves the enterprise's general plan of operation; 5) requires the Tribe to retain a manager to run the enterprise; 6) approves the manager's contract; 7) approves the disposition of any property; 8) reviews the monthly financial statements of the enterprise; 9) attends the Advisory Board and Tribal Council meetings convened to discuss any business relating to the enterprise; 10) reviews the enterprise to conduct an annual audit which is submitted to the Agency for approval. In addition to the above, the Agency provides on-going technical assistance to the Tribe's enterprise in the areas of accounting and fiscal management.



The Tribe maintains one general checking account. From this account the Tribe pays all of its obligations including repaying its loan obligations to the federal government and funding tribal governmental services. All monies received from the operation of the Tribe's business enterprise, including tribal cigarette taxes, are deposited in this account. The Tribe maintains a separate record of the taxes and profits it collects on the sale of cigarettes. The Tribe uses the cigarette taxes to provide tribal services. It uses the profits from the sale of cigarettes to repay its loan obligations to the United States. The revenues generated by tourism are the primary sources of revenue for the Tribe.

The state of California, pursuant to Cal. Rev. & Tax Code § 30101, imposes a tax on the distribution of cigarettes within the state in the amount of $.10 per pack or $1.00 per carton. The state has attempted to impose this tax upon the sale of cigarettes by the Tribe to non-Indians on the Reservation. Pursuant to Rev. & Tax Code §§ 30461 and 30462, all amounts required to be paid to the state are transmitted to the State Tr[illegible]urer to be deposited in the State Treasury to the credit of the Cigarette Tax Fund. Some of these funds are disbursed amongst cities and counties, but none is allotted to the Tribe.

In an attempt to ascertain the impact of this state taxation, which does not allow a credit for commensurate tribal taxation, the California Indian Legal Services contracted with the Survey Research Center of the University of California, Berkeley, to design and conduct a survey to determine the effect of imposing the state's cigarette tax on sales of cigarettes sold and taxed by the Tribe on the Reservation. The results of this survey are described in section D, *infra*.

## III. CONCLUSIONS OF LAW

### A. Definition of the Term "Person"

The California Cigarette Tax Law defines a "person" who is subject to the "tax on distributors" imposed by that law as:

> Any individual, firm, copartnership, joint venture, association, social club, fraternal organization, corporation, estate,

> trust, business trust, receiver, trustee, syndicate, this State, any county, city and county, municipality, district, or other political subdivision of the State, or any other group or combination acting as a unit.

Rev. & Tax Code § 30010. The meaning of the term "person" is a matter of legislative intent. The Tribe contends that the above provision makes no mention of an Indian tribe, and that its language nowhere indicates that it is intended to apply to such a governmental entity, which is distinct from the state and its political subdivisions. Furthermore, the Tribe insists that, under federal law, an Indian tribe is not merely a "group" or a "unit" composed of individuals; instead, an Indian tribe has a specified legal identity as an entity—a domestic dependent nation, a political community which exercises power of self government. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832); *Kagama v. United States*, 118 U.S. 375, 381 (1896). Although it concedes that an individual tribal member may be a "person" within the meaning of the statute, the Tribe asserts that a tribe itself cannot; it is an independent quasi-governmental entity which exists separately from its individual members. *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896).

Moreover, the Tribe emphasizes that, had the legislature intended to include all governmental entities within the meaning of section 30010, then the United States would also be so encompassed. Surely the legislature could not have intended this result, the Tribe reasons; therefore, the statute should be interpreted to include only those entities which are listed therein.

We disagree. It is true that statutes are normally to be interpreted as excluding the sovereign, unless it is specifically included, *United States v. Cooper Corp.*, 312 U. S. 600, 604 (1941); however, an Indian tribe is not a sovereign of equal status with the United States but rather is subordinate thereto. Furthermore, the legislature has defined the term "person" inclusively; the definition does not purport to be exclusive. Indeed, the legislature has employed the term "means" rather than "includes" when defining with exclusivity, *see* the definitions of



"cigarette," "in this state," "untaxed cigarette," etc.[2] Therefore, we hold that an Indian tribe is a "person" within the meaning of the California law.

B. Legal Incidence of the Tax

Direct state taxation of tribal property or the income of reservation Indians is preempted by federal law, and hence invalid in the absence of express congressional authorization. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 171-72 (1973); *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1109 (9th Cir. 1981), *as amended*, 665 F.2d 1390 (1982), *cert. denied*, 102 S.Ct. 635 (1981). *See also Bryan v. Itasca County*, 426 U. S. 373, 376-77 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-81 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

When a federally-conferred immunity is affected by the legal incidence of a tax, a federal court is not bound by a state court's prior characterization of the tax. *First Agricultural Nat'l Bank of Berkshire County v. State Tax Comm'n*, 392 U.S. 339, 347 (1968). A tax "which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser." *Id.* Hence, *First Agricultural Nat'l Bank* held that the legal incidence of a sales tax that required the purchaser to pay the tax to the vendor, required the vendor to add the tax to the sales price and to collect the amount from the purchaser, and established that the tax was to constitute a debt from the purchaser to the vendor, fell upon the purchaser. *See also United States v. Mississippi Tax Comm'n*, 421 U.S. 599, 608 (1975) (test for incidence is whether state requires tax to be passed on to purchaser and be collected by vendor from him). Similarly, in *Diamond National v. State Board of Equalization* 425 U.S. 268 (1976), the Court held that, the state court's contrary determination notwithstanding, the legal incidence of the then-California

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[2] The court also held that the state and tribal substantive regulations could be concurrently enforced without violating the right to tribal self-government. This portion of the court's ruling assumedly has been superceded by *Mescalero, supra.*

sales tax, Cal. R.& T.Code ¶ 6052, fell upon the purchaser. That statute provided:

> Collection by retailer from consumer. The tax hereby imposed shall be collected by the retailer from the consumer insofar as it can be done.

### 1. The *Colville* Case

Recently, the Supreme Court has addressed the concept of legal incidence in the context of state taxation of an Indian tribal retail enterprise. In *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), the Court accepted the conclusion of the district court that the legal incidence of the state cigarette tax there at issue fell upon the non-Indian purchaser. The district court had applied the principle that "where a state requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser," citing *Mississippi Tax Comm'n, supra,* at 608, notwithstanding the fact that the seller was legally liable for the payment of the tax. *Id.* at 607. The district court distinguished the state sales tax, which

> provides that the tax shall be paid by the buyer to the seller, that each seller shall collect the tax from the buyer, . . . that the amount of the tax "shall constitute a debt from the buyer to the seller" . . . . [,] that the tax shall be stated separately from the selling price and not be included in the sales price of an item.

446 F.Supp. 1339, 1352.

By contrast, the cigarette tax lacked similar provisions. The court emphasized particularly "the absence of any provisions requiring that the tax be passed on to the buyer." *Id.* at 1353. Hence, the language of the statute did not inexorably resolve the issue of legal incidence.

In attempting to ascertain the legislature's intent, the court examined two "legislative intent" statutes, applicable only to the cigarette tax, which provided:



> There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes, in an amount equal to the rate of six and one-half mills per cigarette.

R.C.W. § 82.24.020.

> It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein sold, used, consumed, handled, possessed, or distributed within the state and to collect the tax from the person who first sells, uses, consumes, handles, possesses . . . or distributes them in this state. It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event occurring within the state.

R.C.W. § 82.24.080. In an effort to resolve the apparent conflict between these statutes, the court examined other available materials, *i.e.*, state regulations implementing the provisions of the cigarette tax statutes, an opinion of the state attorney general, an opinion of the Washington Supreme Court, and the language of the state legislature's 1975 amendment of the statute. *Id.* at 1353-55. On the basis of these authorities, the court concluded that "the legal incidence could shift depending on the circumstances of the transaction," *id.* at 1355; that is, the first taxable event occurring within the state could be either the sale, handling, possession or distribution of cigarettes by the Indian seller (invalid because the legal incidence fell on an Indian) or the use or consumption of cigarettes by the non-Indian buyer (a valid tax under *Moe*). The court concluded that:

> the legislature's intent [was] to impose the legal incidence of the tax at the earliest constitutional opportunity. Where on-reservation tribal sales to non-Indians are invalid, the first taxable event is, therefore, the use or consumption by the non-Indian purchaser. In such situations, the legal incidence falls upon the non-Indian purchasers rather than the tribal seller.

*Id.*

By contrast, the language of the state tobacco tax in *Colville* was far less ambiguous, and the court easily concluded that the legal incidence of the tax fell upon the dealer. Of this tax, the court stated:

> A similar conclusion cannot be reached with respect to State's tobacco products tax. . . . [T]he statutory language . . . makes it clear that the legal incidence of the tax falls upon the Dealer. Actually the state imposes two taxes upon specified tobacco products other than cigarettes. . . . The second tax is "upon the sale, use, consumption, handling, or distribution of all tobacco products" in Washington. . . . Unlike the cigarette tax, there is no statutory language imposing the tax upon the first taxable event. Rather the tax is imposed when "the distributor (a) brings, or causes to be brought, into this state from without the state tobacco products for sale." . . . Thus, in both instances the legal incidence falls upon the Dealer and the tax is invalid.

*Id.* at 1355 n.15.

2. The California Statute

The California taxing scheme provides in part:

> Every distributor shall pay a tax upon his distribution of cigarettes . . . at the rate of five mills . . . [for each cigarette].

R. & T. Code §30101.

> "Distribution" includes 1) the sale of untaxed cigarettes in this state and 2) the use or consumption of untaxed cigarettes in this state.

Section 30008.

> "Use or consumption" includes the exercise of any right or power over cigarettes incident to the ownership thereof, other than the sale of the cigarettes or the keeping or retention thereof for the purpose of sale.

Section 30009.

> "Distributor" includes every person who . . . within the meaning of the term "distribution" . . . distributes cigarettes.



Section 30011.

> "Untaxed cigarette" means any cigarette which has not yet been distributed in such a manner as to result in a tax liability under the tax law.

Section 30005.

> Every distributor engaged in business in this state and selling or accepting orders for cigarettes with respect to the sale of which the tax imposed by Section 30101 is inapplicable shall, at the time of making the sale or accepting the order or, if the purchaser is not then obligated to pay the tax with respect to his distribution of the cigarettes, at the time the purchaser becomes so obligated, collect the tax from the purchaser, if the purchaser is other than a licensed distributor, and shall give the purchaser a receipt therefor in the manner and form prescribed by the board.

Section 30108(a).

> The taxes required to be collected by this section constitute debts owed by the distributor, or other person required to collect the tax.

Section 30108(d).

Section 30108(a) appears to be a mandatory "pass through" provision, the result of which, under *Mississippi Tax Comm'n*, is that the legal incidence of the tax falls upon the purchaser. The cigarette tax scheme is basically composed of a sales tax payable at the wholesale level with a compensating use tax imposed upon persons who use or consume cigarettes when the sale of those cigarettes cannot be subject to the California tax. A vendor of cigarettes, the sale of which is not subject to the California tax, must collect the tax from the user and pay the tax to the state.

The cigarette tax is imposed upon "every distribution"; distribution includes both the sale and the use or consumption of untaxed cigarettes. Thus, in the instant case, since the tax cannot constitutionally be imposed upon Indian vendors, the incidence of the tax, as in *Colville*, falls upon the purchaser, although the Indian tribe remains liable for collection of the tax. It appears, as

in *Colville*, that the Code imposes a tax on the first constitutionally taxable distribution—in this case, the use or consumption of the cigarettes.

Moreover, if the legal incidence of the optionally-worded sales tax at issue in *Diamond National, supra*, was held to fall upon the purchaser as a matter of federal law, then, in light of the apparently mandatory collection requirement imposed by section 30108, the legal incidence of the cigarette tax must surely fall upon the purchaser in this case as well. Admittedly, the statute nowhere refers to the "first taxable event," the phrase emphasized in *Colville*. Nor is there explanatory authority available, as there was in *Colville*. However, we conclude that, in light of the mandatory pass-through language of section 30108(a), the legal incidence of the tax at issue herein falls upon the purchaser.

C. Preemption

1. Supreme Court Authority

In approaching the difficult problem of state taxation, the trend of recent analysis "has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." *McClanahan, supra*, at 172. *See also Fort Mojave Tribe v. San Bernardino County,* 543 F.2d 1253, 1255 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). The question of federal preemption is not controlled by standards of preemption developed in other areas. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

> Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional acts promoting tribal independence and economic development, inform the preemption analysis that governs this inquiry.

*Ramah Navajo School Bd. v. Bureau of Revenue,* 102 S.Ct. 3394 (1982). Congress need not expressly state its preemptive intent; "it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy." *Crow Tribe, supra,* at 1109. The court must make "a particularized inquiry into the nature of the State, Federal and tribal interests at stake,



an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 1109, *quoting Bracker, supra,* at 149. *See also Ramah, supra,* at 3399.

Several times in recent years, the Court has determined that Congress had so completely occupied a field by virtue of its detailed regulation thereof, that state regulation of the same subject matter was precluded. In *Warren Trading Post v. Arizona Tax Comm'n,* 380 U.S. 685 (1965), the Court held that a federally-licensed Indian trader trading on a reservation was immune from state gross sales or income taxation. Such a tax would, *Warren* emphasized:

> frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts.

*Id.* at 691. The state was thus interdicted from imposing a tax which would "disturb and disarrange the statutory plan." *Id.*

In *Bracker, supra,* the Court applied these principles in concluding that federal law preempted application of Arizona's motor carrier license and use fuel taxes to a non-Indian logging company's activities on tribal land. The federal regulatory scheme encompassing Indian timber harvesting was sufficiently pervasive to oust additional state regulation. That regulation was embodied in "Acts of Congress, detailed regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs." *Id.* at 145. In *White Mountain Apache Tribe v. Arizona Dept. Game & Fish,* 649 F.2d 1274 (9th Cir. 1981), the Ninth Circuit identified the three factors in *Bracker, supra,* upon which the Supreme Court had based its finding of preemption:

> 1) the comprehensive and pervasive federal regulatory scheme for harvesting and marketing Indian timber left no room for additional state taxes or burdens;

2) "the assessment of state taxes would obstruct federal policies [relating to the profitability and management of the Indian logging enterprise]"; and

3) there was no "regulatory function or service performed by the State that would justify the assessment of taxes," the "general desire to raise revenue" alone being an insufficient justification for taxation here in light of the "significant geographical component to tribal sovereignty," a factor which (although "not absolute") is "important" and "highly relevant" in preemption analysis. *Id.* at 147, 100 S.Ct. at 1586.

*Id.* at 1278-79.

More recently, in *Ramah, supra,* the Court held that federal law preempts state taxation of the gross receipts received by a non-Indian construction company from a tribal school board for the construction of a school for Indian children on the reservation. Finding the case "indistinguishable" from *Bracker,* the Court concluded that "[f]ederal regulation of the construction and financing of Indian education institutions is both comprehensive and pervasive." *Id* at 3400. The Board had obtained funds for the school facilities from a series of congressional appropriations earmarked for that purpose; the Indian Self-Determination Act specifically declared that the provision of adequate educational services to Indian children was a major national goal, 25 U.S.C. § 450a(c), and that parental and community control of the educational process was of crucial importance. Section 450(b)(3). Pursuant to statutory authority, the Secretary had promulgated detailed regulations concerning school construction, including the monitoring and reviewing of subcontracting agreements.

The additional state tax, although falling nominally on the non-Indian contractor, would have depleted the funds available for school construction, since the tax was included in the bids as a cost of construction, and thus the tribe reimbursed the contractor for the amount of the tax. Such a dissipation of funds would have impeded the federal interest in promoting Indian educational opportunities. Finally, the state did not seek to assess the tax in



return for governmental services it provided to those upon whom the tax was imposed. Thus, although the legal incidence of the tax fell upon the non-Indian contracting firm, the "ultimate burden," *id.* at 1184, fell upon the tribal organization, and the actual impact of that burden was relevant for purposes of preemption analysis. That is, the fact that the legal incidence of a tax does not fall upon the tribe is a necessary but not sufficient consideration in determining its validity *vel non.*

In *Central Machinery Co. v. Arizona Tax Comm'n,* 448 U.S. 160 (1980), the Court held that the Indian trader statutes preempted the state's jurisdiction to tax the sale, on a reservation, of farm machinery to an Indian tribe by a corporation that did not reside on the reservation and was not licensed to trade with Indians. Although the gross receipts tax was assessed against the seller/corporation, the corporation added the tax to the sale price, thus increasing the total purchase price to the tribe. In both *Central Machinery* and *Ramah, supra,* the state provided few on-reservation services to the sellers of the goods and services; the taxes were mere revenue-raising measures, as in *Bracker.* The non-Indians who were subject to the tax did engage in business off, as well as on, the reservation, and the state assumedly provided substantial services to their off-reservation activities. However, the Court stated that the state tax revenues derived from the off-reservation activities would "presumably" be sufficient to reimburse the state for such off-reservation services.

The Court, then, has found federal preemption in areas which have been specifically regulated in a detailed fashion by Congress, or which affect adversely such a particularized regulatory plan. However, the Court has not suggested that such federal preemption exists in the area involved in the case at bar.

In *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463 (1976), the Court held, *inter alia,* that a state could validly impose a cigarette tax on sales by smokeshops operated by tribal members and located on leased trust lands upon the reservation and that the smokeshop operators could be required to collect the tax (since, in that case, the legal incidence of the tax fell upon the non-Indian purchaser);

> The State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation. Such a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians.

*Colville, supra,* at 151 (construing *Moe*). In *Moe,* the Court stated that the "minimal burden," which is imposed upon an Indian tribal seller of cigarettes by the state's requirement that the seller collect a tax validly imposed on a non-Indian, does not violate any congressional enactments dealing with the affairs of reservation Indians. *Moe, supra,* at 483.

In *Colville, supra,* the Court explicitly held that, even when afforded "the broadest reading to which they are fairly susceptible," *id.* at 155, the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.,* the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.,* and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.,* did not preempt the state's sales and cigarette taxes. Despite the fact that these statutes

> evidence to varying degrees a congressional concern with fostering tribal self-government and economic development, . . . none goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State.

*Id.*

On the basis of this authority, we conclude that the state's tax in the instant case is not preempted by the general provisions or policies of the previously mentioned federal statutory schemes.

2. Specific Statutes

The Tribe contends that, their general policies aside, the specific provisions and application of the Indian Financing Act and the Buck Act do preempt state law in this case.

a. The Indian Financing Act

As previously noted, the Tribe applied for, and obtained, its loan funds from the United States Indian Revolving Loan Fund in



order to purchase the assets, and to operate the facilities, of Havasu Landing and the mobilehome park. In enacting the Indian Financing Act, the Tribe contends that, as in *Bracker, Ramah,* and *Central Machinery,* Congress has regulated, in a detailed and comprehensive manner, businesses purchased and operated with funds obtained from the Indian Revolving Loan Fund. This Fund was established in order to provide a source of funds for Indians and Indian tribes for the purpose of promoting and improving economic development on Indian reservations:

> Loans may be made for any purpose which will promote the economic development of . . . the Indian organization and its members.

25 U.S.C. § 1462.

> Loans from the Indian Revolving Loan Fund shall be made for purposes which will improve and promote the economic development on Indian Reservations.

25 C.F.R. § 101.2.

> [D]irect loans from the United States will be made . . . to eligible tribes, . . . to finance economic enterprises operated for profit, the operation of which will contribute to the improvement of the economy of a reservation and/or the members.

25 C.F.R. § 101.2(b)(1).

In the case at bar, the *profits* from the sale of cigarettes go to the Tribe in its proprietary capacity as a retailer to repay its loan obligations; the *tax* revenues are received by the Tribe in its governmental capacity to provide governmental services to those persons who reside at, work on, or visit the reservation. Thus, the imposition of the state cigarette tax will allegedly have a two-fold impact: it will impede the efforts of the United States to advance its policies as embodied in the Indian Financing Act and will hinder the ability of the Tribe to repay its loan obligations to the government and to continue to operate the Landing for the economic benefit of the Tribe.

The Indian Financing Act regulations deal with the method of repayment, financing, interest created, title to property, etc., but

do not regulate tribal sales of cigarettes of non-tribal members. This, however, is relevant but not necessarily dispositive. In *Bracker*, the Court struck down Arizona's use fuel tax and motor carrier tax because the imposition of these state taxes was preempted by comprehensive federal regulations concerning the harvesting and sale of timber. The federal regulations did not address the identical subject matter regulated by the state taxes. *See also Ramah, supra,* at 3401 n.5. Hence, federal regulation of a particular subject matter may be sufficiently comprehensive so as to preempt state regulation of collateral matters which affect the federal scheme.

*Colville* explicitly held that the Indian Financing Act did not preempt the state cigarette tax therein. *Colville, supra,* at 155. However, the Tribe urges that *Colville* merely preemptive effect *vel non* of the *general intent* and purpose of statutes such as the Act. The Court did not analyze the impact of the specific provisions and regulations of that Act in a particular context.

The foregoing notwithstanding, we are not persuaded that the specific involvement of the Indian Financing Act in this case preempts the state tax at issue, that is, that the Act operates to preempt state regulation of *any* particular Indian enterprise funded thereunder. A contrary conclusion would lead to unpredictable, unprincipled and incongruous results. A state would be required to predict and identify, on an *ad hoc* basis, the particular enterprise an Indian tribe might choose to pursue, and the validity of state taxation would vary from reservation to reservation within the state and from time to time within a specific reservation, if the tribe should abandon one enterprise and initiate another. This uncertainty would result from the fact that, unlike the statutes in *Bracker* and *Ramah,* the Indian Financing Act does not single out particular areas of activity—harvesting timber, encouraging education—to regulate or promote. It merely regulates the provision and utilization of federal funds. The Tribe's decision to engage in a specific business alone creates the categorical specificity. We conclude that the mere fact that an Indian enterprise is funded by a federal loan does not automatically preempt state taxation of the income generated by that enterprise.



Our conclusion is not inconsistent with *New Mexico v. Mescalero Apache Tribe,* 51 U.S.L.W. 4741 (June 14, 1983), in which the Court held that state hunting and fishing regulations which conflicted with tribal ordinances regulating in detail the conditions under which both members and nonmembers of the tribe could hunt and fish on the reservation, were preempted by federal law. The Court noted that "concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation." *Id.* at 4745. That authority, the Court emphasized, had been repeatedly affirmed by federal treaties and laws, as well as by prior Court decisions. With extensive federal assistance and supervision, the Tribe had attempted to establish "a comprehensive scheme for managing the reservation's fish and wildlife resources," *id.* at 4741, for the benefit of its members. The Court asserted:

> It is most unlikely that Congress would have authorized, and the Secretary would have established, financed, and participated in Tribal management if it were thought that New Mexico was free to nullify the entire arrangement. Requiring Tribal ordinances to yield whenever State law is more restrictive would seriously "undermine the Secretary's [and the Tribe's] ability to make the wide range of determinations committed to [their] authority. [citations].

The assertion of concurrent jurisdiction by New Mexico not only would threaten to disrupt the federal and tribal regulatory scheme, but would also threaten Congress' overriding objective of encouraging tribal self-government and economic development. The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. This case is thus far removed from those situations, *such as on-reservation sales outlets which market to nonmembers goods not manufactured by the tribe or its members, in which the tribal contribution to an enterprise is de minimus. See Washington v. Confederated Tribes,* 447 U.S. 134, 154-59 (1980).

*Id.* at 4745 (emphasis added). In light of the above language, we conclude that "on-reservation value" may be generated by the Tribe's manufacture of a product or its regulation of its own natural resources. However, the mere fact that a tribe borrows money from the federal government in order to engage in a commercial enterprise, and therefore subjects the operation of that enterprise to federal supervision, does not effect *per se* a federal preemption of state regulatory/taxing authority. Moreover, unlike state substantive regulations of hunting and fishing, concurrent state and tribal taxation would not effectively nullify a tribal commercial enterprise.

b. The Buck Act

The Tribe urges that the state's cigarette tax has been preempted by the Buck Act, 4 U.S.C. §§ 105-10. The Act permits states to collect sales, use or income taxes within any federal area, section 105. However, the Act further states:

> Nothing [herein] shall be deemed to authorize the collection of any tax on or from any Indian not otherwise taxed.

Section 109. An opinion of the Solicitor of the Interior Dept. released prior to the passage of the Act, wherein the Solicitor stated that the state could not impose a cigarette tax upon sales of tobacco by Indians on the reservation. He premised this conclusion upon sales of tobacco by Indians on the reservation. However, that opinion does not purport to relate to the specific provisions or purpose of the Buck Act and assumedly has been severely undermined by *Moe* and *Colville.*

The Tribe urges that ambiguous federal statutes enacted for the benefit of Indian tribes are to be liberally construed in their favor, *citing Bryan v. Itasca County*, *supra*, at 392. The statute at issue, however, is not afflicted with ambiguity. Section 109 merely does not authorize state taxation of Indians not otherwise validly taxed. Indeed, in *Warren Trading Post*, *supra*, at 691 n.18, the Court stated that the Buck Act does not apply to Indian reservations. Although in *Warren,* the Court struck down a state tax levied upon a federally licensed non-Indian doing business on an Indian



reservation, the Court did not premise this holding on the preemptive effect of section 109. It merely invoked that section as a basis upon which to reject the state's argument that the Buck Act granted the state authority to tax under the circumstances of that case. Our research reveals that case law under the Buck Act is sparse, and no court has explicitly held that the Act affirmatively preempts any form of state taxation. The Act merely maintained any existing tax-exempt status the Indians may have enjoyed. *See, McClanahan*, *supra*, at 176. Indeed, in *McClanahan*, the Court stated that "the Buck Act itself cannot be read as an affirmative grant of tax-exempt status to reservation Indians." *Id.* at 177. The Tribe therefore cannot prevail on this basis.

D. Interference with Tribal Self-Government/Indian Commerce Clause.

1. Supreme Court Authority

In *Williams v. Lee*, 358 U.S. 217 (1959), a non-Indian trader licensed by the federal government attempted to collect a debt owed him by an Indian by bringing suit against the Indian in state court. The Court found that such a suit "would undermine the authority of the tribal courts over Reservation affairs and would infringe on the rights of Indians to govern themselves." *Id.* at 223. In formulating this "infringement test," the Court noted that:

> [A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

*Id.* at 220. The Court later elaborated upon the appropriate occasions which justify the invocation of this test:

> [C]ases applying the *Williams* test have dealt principally with situations involving non-Indians. . . . In these situations both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

*McClanahan, supra*, at 179.

Since *Williams*, the Court has acknowledged the test in dictum, *see Bracker, supra*, at 142-43; *Mescalero, supra*, at 4744 n.16; and has applied the principle twice, *see Colville, supra*, and *Moe, supra*, but has not yet found a violation thereof. *See generally*, Mundell, *The Tribal Sovereignity Limitation on State Taxation of Indians*, 15 Loyola L.A.L.Rev. 195 (1982). The Court prefers to rely upon a federal preemption analysis. Only when such preemption is clearly not present, as is the case herein, does the Court resort to the "infringement" test.

The Court has consistently denied that state taxation of non-Indians engaged in on-reservation activity violates the tribal sovereignity limitation. However, in *Colville*, the Court developed a balancing test which may have given further force to the doctrine in situations where the tribe has imposed its own commensurate tax on the same activity. In *Colville*, the Court more specifically described the "infringement" test as requiring the court to balance the respective federal, state and tribal interests. 447 U.S. 156-57. In balancing these interests, the Court recognized that the interests of the tribes "in raising revenues for essential governmental programs" was greatest:

> when the revenues are derived from value generated on the reservation by activities involving the tribes and when the taxpayer is the recipient of tribal services.

*Id.* On the other hand, the Court indicated that the state's interest in raising revenues is:

> strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

*Id.* at 157.

Both *Moe* and *Colville* have established that the application of a state cigarette tax to sales of cigarettes by Indians to non-Indians on a reservation, where the legal incidence of the tax falls on the purchaser, does not in and of itself unduly infringe upon tribal self-government, despite the fact that such tax will deprive the tribe of revenue. *Id.* at 158-59. However, *Colville* did not resolve the crucial issue of double taxation, although it did hold that the state need not afford the purchaser a tax credit for tribal



taxes when the tribe is marketing *only* a tax exemption. The Court stated that the argument that the tribe would be placed at an impermissible competitive disadvantage by the overlap of state and tribal taxation "is not without force," *id.* at 157, but found that the tribe had failed to demonstrate *in that case* that their business would have been reduced by a state tax *without* a credit, as compared to a state tax *with* a credit. In *Colville*, even with a credit, on- and off-reservation prices would have been the same, and, since purchasers entered the reservation only because cigarettes were less expensive there, those purchasers would have had no incentive to travel to the reservation if prices there were equivalent. The Court concluded:

> [W]e cannot infer on the present record that by failing to give a credit Washington impermissibly taxes reservation value by deterring sales that, if credit were given, would occur on the reservation because of its location and because of the efforts of the Tribes in importing and marketing the cigarettes.

*Id.* at 158. Hence, the mere imposition of the state tax without a credit did not contravene tribal self-government under the record and circumstances existing in *Colville*. However, the *Colville* balancing test may be applied to evaluate the legitimacy of state's refusing to afford a tax credit under circumstances which differ from those of *Colville*.

2. Ninth Circuit Authority

We approach the *Colville* balancing analysis with a view to recent Ninth Circuit authority. The Ninth Circuit has applied the *Williams* infringement test quite restrictively when addressing the double taxation issue. In *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), the court analyzed the validity of a state possessory interest tax imposed on non-Indian lessees of Indian trust land. The tribe, as part of a plan for the economic development of the reservation, had entered into a series of 99-year leases with non-Indian lessees and had also imposed its own possessory interest tax. After determining that the county leasehold interest tax was not preempted by federal law, the court held that the interference

with tribal self-government was not serious enough to invalidate the tax under *Williams*. In upholding the state's right to tax, the court stated:

> The interference with Indian self-government in the instant case is much less serious. No Indian or Indian land is being subjected to direct state court process. The only effect of the tax on the Indians will be the indirect one of perhaps reducing the revenues they will receive from the leases as a result of their inability to market a tax exemption. Such an indirect economic burden cannot be said to threaten the self-governing ability of the tribe.
>
> The assertion that "double taxation," resulting from the imposition of a tax both by the county and the tribe, impairs the ability of the tribe to levy its tax is not persuasive. There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power.

*Id.* at 1258. Hence, *Fort Mojave* indicates that a state tax's indirect, albeit adverse, impact upon a tribe's ability to levy its own tax and thereby to raise revenues does not rise to the level of an infringement on tribal sovereignty. Although it preceded *Colville*, *Fort Mojave* is apparently still "good law" and was recently cited with approval in *Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894, 909 (1982).

In more recent decisions, the Ninth Circuit has not departed from its basic position in *Fort Mojave*. In *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (9th Cir. 1981), the court held, *inter alia*, that a state could impose nondiscriminatory hunting and fishing license requirements on non-Indians on reservations without violating the right of tribal self-government, even where a double license fee might reduce the revenues of the tribe, if "the state has a substantial conservation interest." *Id.* at 1284. In analyzing the right to tribal self-government, the court stated:



> We hold that the right of tribal self-government extends only to intratribal relations and to concurrent civil authority over visitors to reservations.
>
> When a state has proposed to tax non-Indians for their on-reservation activities, the courts have almost uniformly found the tax permissible, even if the tribe was laying its own tax on the same activities; the consequent reduction of Indian tax and business revenues does not violate the right of tribal self-government. *Colville Cigarettes Case*, 100n S.Ct. at 2082-83; *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d at 1258. Double taxation does not diminish a tribe's authority to tax non-Indians or otherwise regulate them, *Colville Cigarettes Case*, . . . and a tribe has "no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all," *id.*, 100 S.Ct. at 2080 n.27.

*Id.* at 1284. The court continued:

> [I]t was established in the *Colville Cigarettes Case* that a nondiscriminatory state tax on non-Indians does not violate the right of tribal self-government even if it has the indirect effect of crippling a tribal commercial program; . . . . We do not now decide whether a state tax or fee which, although otherwise valid, renders a tribe so destitute that it cannot finance even the barest essentials of self-government (*e.g.*, the tribal council, court and police) would violate the right.

*Id.* at 1285 n.13. Thus, a state tax which, imposed without a credit, would severely distrub a tribe's ability to provide essential governmental services may violate the right to tribal self-government. Otherwise, a state regulation will contravene the principle of tribal self-government only if it intrudes upon "intratribal relations."

In *Crow Tribe of Indians v. Montana*, 650 F.2d 1104 (9th Cir. 1981), *as amended*, 665 F.2d 1390 (1982), *cert. denied*, 102 S.Ct. 635 (1981), the court employed the *Colville* interest-balancing test to evaluate a state law which imposed a severance tax on coal produced in the state and a gross proceeds tax on the sale of such coal. Vast deposits of coal underlay the reservation and an adjacent "ceded strip." In an effort to develop these resources, the

Tribe entered into mining leases with several non-Indian companies that embraced the coal beneath the ceded strip. Several years later, the state imposed the above taxes, thereby appropriating to itself most of the economic rent from the coal production. Hence, the state taxes deprived the Tribe of "a large portion of the economic benefits of its coal." *Id.* at 1113.

The Tribe brought suit, seeking injunctive and declaratory relief, alleging that the state taxes were 1) preempted by federal law; and 2) violated the *Williams* infringement test in that the taxes infringed on the Tribe's ability to levy its own severance tax,[3] and deprived the Tribe of the ability to negotiate higher royalties and thereby to generate revenues needed for various tribal programs and services.

The district court had dismissed the Tribe's complaint for failure to state a cause of action. The Ninth Circuit reversed. In addressing the Tribe's allegations, the court rested on both grounds. Although invoking a balancing test in both its federal preemption and tribal self-government analyses, the court distinguished the doctrines:

> The self-government doctrine differs from the preemption analysis in that it specifically prohibits state action that impairs the ability of a tribe to exercise traditional governmental functions such as zoning, . . . vehicle registration, . . . or the exercise of general civil jurisdiction over the members of the tribe. . . .

*Id.* at 1110. In regard to the impairment of tribal tax argument, the court noted:

> [W]e think that even if the state and tribal taxes were imposed on the same activity, that fact alone would not preclude the state from imposing its tax. Each taxing body is free to impose its tax, since neither tax by its terms precludes the other. [citing *Colville*]. As a practical matter, however, it is true that Montana's tax may force the Tribe to choose

[3] The Tribe had not yet applied its own severance tax to coal removed from the "ceded strip" of land at issue.



> between imposing its tax, thereby discouraging coal mining, or foregoing tax revenues.

*Id.* at 1115-16. The court further remarked that both arguments (impairment of tribal tax and infringement on self government) raised essentially the same problem: "that of the state's depriving the Tribe of potential revenues." *Id.* at 1116. While accepting as true the allegation that the state tax had a severe economic impact upon tribal government, the court stated that:

> Tribal economic activity, while perhaps providing the wherewithal for tribal governments to sustain themselves, is at best indirectly linked to the effectiveness of tribal government. It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 152-56 . . . (1980).

*Id.* at 1116. The court concluded:

> In this case, the revenues sought to be taxed by Montana may ultimately be traced to the Tribe's mineral resources, a component of the reservation land itself. This is not a case where the tribe is simply marketing a tax exemption, as where the tribes seek to sell tax-free cigarettes to non-Indians. Any substantial incursion into the revenues obtained from the sale of the Indians' land-based wealth cuts to the heart of the Tribe's ability to sustain itself.

*Id.* at 1117. With the above qualifications in mind, we now proceed to analyze the extent to which the state tax at issue herein intrudes upon the Tribe's ability to govern itself.

3. The Instant Case

a. The State's Interest

As previously mentioned, *Colville* recognized that a state

> has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

447 U.S. at 157. Here, it cannot be said that the tax is directed at "off-reservation" value. The tribe sells cigarettes as part of a legitimate business enterprise, at prices comparable to those sold elsewhere off the reservation, to persons who live on the reservation or who enter in order to enjoy its recreational resources. The retail price of cigarettes vary throughout the state, depending upon the individual retailer's marketing and promotional strategies. Declaration of Robert G. Posner at 3. The factors which influence this choice include a store's volume of sales, location and the type of consumer products it sells. Declaration of Sandra Campbell.

Robert G. Posner is an Economic Development Planner and Business Developer with the National Economic Development and Law Center, which was employed by the California Indian Legal Services to:

> Investigate the wholesale and retail pricing structure for cigarette sales, with specific reference to actual practices in a nearby locality;
>
> Explore the leeway possible in setting retail prices for cigarettes;
>
> Analyze the effect of the State of California tax structure on retail prices;
>
> Analyze the effect of varying markup rates on retail prices;
>
> Summarize the effect of marketing practices on retail prices.

Declaration of Posner at 2. On the basis of his study, he concludes that the retail pricing structure for the tribal sales parallels that industry practice of flexible pricing as it applies to the allocation of the cost of sales to the retail price, that is, the allocation of direct sales expenses and overhead expenses to the retail price structure. Although conceding that he lacks complete data as to the tribal pricing practices for other convenience goods and services, he concludes that the retail price of cigarettes on the reservation carries the same tax allocation as non-reservation retail sales, and that the variance is attributable to the cost-of-sales allocation. *Id.* at 5. The resultant tribal price is approximately $.30 less per carton than the lowest price offered by



convenience stores which Mr. Posner surveyed. He concludes that the retail price difference is not sufficient to be a major factor in inducing cigarette sales. *Id.* at 6. We are similarly persuaded that the $.30 difference does not itself draw purchasers to a reservation such as this, which offers extensive recreational opportunities.

The second facet of the *Colville* test concerns the nature of the services which the state provides to the taxpayer. In this case, the non-Indian taxpayer/purchaser enters the reservation from California and other states; some live on the reservation. In the study conducted on the reservation, 63% of the respondents who took the study were residents of California. Exhibit J, p. 23. All the reservation denizens are California residents and enjoy access to extensive state services off the reservation. The state provides substantial services on the reservation: the state maintains a county road which leads to, and runs two miles within, the reservation. The children of the Indian and non-Indian residents of the reservation attend a public school in Needles, California, which is supported by federal, state, and local funds. They are transported at public expense. The Tribe operates a grammar school on the reservation; the Needles Unified School District pays its operating expenses, including teacher salaries. The Tribe provides only the building. Finally, pursuant to 18 U.S.C. § 1162, the state provides law enforcement assistance on the reservation.

b. The Tribe's Interest

The Tribe uses its tax revenues to provide essential governmental services. Sales generated by tourism are the primary sources of these revenues. The Tribe provides the following types of services: water service, law enforcement, sanitation services, road maintenance, fish and wildlife management, housing improvement program, housing provided to tribal members, community welfare and recreation, postal services. In 1978, the approximate cost of these services was $109,728. Of that amount, less than 25% was reimbursed through federal grants or other federal assistance. Thus, the Tribe, as well as the state, funds services to those who live on, and visit, the reservation.

The Tribe has attempted to demonstrate that it will suffer a loss of significant revenues if not afforded a tax credit by the state. In

1981, California Indian Legal Services contracted with the Survey Research Center of the University of California to design and conduct a survey to determine the effect of imposing the state cigarette tax, without a credit, on tribal cigarette sales. The Research Center prepared a questionnaire and conducted a survey on the reservation. The Center reported:

> More than three-quarters of the respondents were non-resident visitors to the reservation; the vast majority of those visitors (82%) lived elsewhere in California.
>
> About four out of every five of the visitor/respondents (82%) had visited the reservation before; most of these persons (66%) had visited several times in the past two years.
>
> The activities most frequently mentioned by visitor/respondents as planned during their stay were water sports (84%) and fishing (39%).
>
> Most of the visitor/respondents intended to stay at the reservation at least one night but less than one week. Some 60% of the non-resident respondents stayed in campgrounds and mobile home parks maintained by the reservation.
>
> Among both resident and visitor respondents, a substantial minority (between 30 and 45%) bought cigarettes in amounts of one carton or more.
>
> On the average, visitor/respondents reported that single packages were about $.15 cheaper and cartons about $.40 cheaper on the reservation than in their home cities.
>
> For the majority of visitor/respondents (56%), the price of cigarettes per carton on the reservation during the study period was within $.50 of the price paid in their usual place of residence. Only 8% paid more than $.50 in excess of the reservation price at home, while 36% paid at least 50% less at home. However, after a tax increase of $1.00 per carton, about 49% of the respondents would pay at least $.50 more per carton on the reservation; less than 3% would continue to face reservation prices as much as $.50 lower.



> About 55% of resident/respondents and 38% of non-resident/respondents say that they would buy fewer cigarettes if the price were increased by $.10 per pack.

Report at 6-7. The Report concluded:

> While the majority of the visitors who buy cigarettes on the reservation face prices similar to those paid at home, a sizable minority of visitors can purchase cigarettes at significantly lower prices. A tax increase of $1.00 per carton would eliminate this differential and thereby remove the incentive to stockpile for future home use. Still other visitors would experience the tax as an increase in the price over and above what they pay for cigarettes at home. These persons would be motivated to stock up at home before visiting the reservation.
>
> Respondents' reports of how they would react to a price increase are consistent with the direction of the changes in relative price: both visitors and residents say they would buy fewer cigarettes if the cost went up by an amount equal to the state tax.

*Id.* at 7-8.

Despite the above study, we cannot say that the Tribe has sufficiently demonstrated that it will be unable to provide essential tribal services, such as courts, if the state cigarette tax is imposed without a credit on on-reservation cigarette sales. Concerning its study, the Center candidly conceded that it was limited in scope and lacked a "rigorous framework for inference" and merely suggested the effect that might be observed if the respondents behaved in accordance with their reported intentions. Furthermore, the percentages of respondents who purportedly would buy "fewer" cigarettes are not enormous. Finally, having considered the tribal financial statements for the fiscal year 1981-82, we are unable to conclude that the anticipated reduction of profits/tax revenues from the sales of cigarettes would render the Tribe so destitute as to emasculate its ability to conduct its tribal government. The Tribe is free to reduce its tribal tax to ensure that on-reservation and off-reservation cigarette sales are reasonably competitive; it will then still retain its present level of profit on such

sales. In light of the relevant Ninth Circuit authority, we cannot conclude that the imposition of such a choice impermissibility intrudes upon tribal self-government.

c. The Federal Interest

The federal government has an interest in the effectuation of its policy of promoting tribal economic independence and self-government and in the recovery of its loans to the Tribe.

4. Conclusion

In sum, having considered the strengths of the foregoing interests, we conclude that the state enjoys the power to impose a nondiscriminatory cigarette tax without affording a credit for the tribal tax. Although the Tribe sells cigarettes at competitive prices, as part of a functioning commercial enterprise, to persons to whom it provides some governmental services, it has failed to demonstrate that its ability to conduct its tribal government will be seriously jeopardized if its cigarette sales fall to the degree anticipated by the Report. Moreover, the state does provide extensive governmental services on the reservation; therefore, its interest in obtaining tax revenues from on-reservation sales is substantial.

E. Burden Upon/Discrimination Against Indian Commerce

The Tribe asserts that the state cigarette tax unconstitutionally burdens Indian commerce by imposing a multiple tax burden. Arguing by analogy from the Supreme Court's decisions concerning interstate commerce, the tribe contends that a state tax is valid only if it 1) has a sufficient nexus to the taxing state; 2) does not discriminate against interstate/Indian commerce; 3) is fairly apportioned and 4) bears a fair relation to services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 247, 277-78. 279 (1977). The Supreme Court, however, has never relied upon the principles embodied in its interstate commerce decisions in resolving Indian commerce clause issues.[4]

[4] Although the Court stated cryptically in *Merrion, supra,* at 912 n.26:

> [W]hen the activity taxed by the Tribe occurs entirely on tribal lands, the multiple taxation issue would arise only if a *State* attempted to levy a tax on the same activity, which is more than the *State's* contact with the activity would justify. In such a circumstance, any challenge asserting that tribal and State taxes create a multiple burden on interstate commerce should be directed at the State tax, which, in the absence of congressional ratification, might be invalidated under the Commerce Clause. These cases, of course, do not involve a challenge to state taxation, and we intimate no opinion on the possibility of such a challenge.



The Tribe, however, does not rely upon *Complete Auto Transit* to support its further assertions that the state tax explicitly discriminates against Indian commerce in two distinct ways. First, the state prohibits the Tribe from participating in the revenue-sharing scheme which it has established for city and county governments. Second, the state does not give credit to persons who pay tribal cigarette taxes, although it affords such a credit to sister states.

1. City and County Governments

Pursuant to R. & T. Code §§ 30461 and 30462, all cigarette tax revenues required to be paid to the state under the state tax law are transmitted to the State Treasurer to be deposited in the State Treasury to the credit of the Cigarette Tax Fund. Under state law, all money deposited in the Cigarette Tax Fund is disbursed in accordance with section 30462.[5] Under the state's statutory

In the case at bar, we conclude that the state's contact with commercial activities conducted on the reservation justifies the imposition of the state cigarette tax without a tax credit.

[5] Section 30462 provides:

> All money deposited in the Cigarette Tax Fund is hereby appropriated, . . . and shall, upon order of the State Controller, be drawn therefrom and allocated for the following purposes: (a) to pay the refunds authorized by this part. (b) To the Controller in an amount equal to 30 percent of the money in the fund which is derived from taxes imposed . . . , such money to be dispursed by the Controller . . . on the fifteenth day of each month thereafter to each city and county in the state in the following manner: (1) The money to be allocated pursuant to this subdivision shall be divided into two separate accounts, one for the cities and counties and counties of the state and one for the cities of the state. In order to determine

scheme, the state refunds to local city and county governments three cents on every cigarette tax dollar that is collected by cigarette retailers within their respective jurisdictions. The state does not return to the Tribe any portion of the cigarette taxes that the Tribe collects in its capacity as a retailer from non-Indian purchasers who purchase cigarettes on the reservation. However, the cities and counties are not obligated to use the funds for the general good of the state; moreover, they receive only a very small percentage of the tax revenues collected. We perceive no argument which would persuade us that the Tribe, merely because it *does* provide some services to visitors from across the state, should equitably share in the fund. Indian tribes are simply not the equivalent of state or local governments. We hold that the state's failure to include the Tribe in its revenue-sharing scheme does not discriminate against Indian commerce in violation of the Indian Commerce Clause.

2. Multi-State Tax Compact

Pursuant to R.&.T. Code § 38001 *et seq.*, the state has ratified the Multi-State Tax Compact. Under Article V of the Compact, California apportions its sales and use taxes by affording a tax credit to persons who pay such taxes to sister states.[6] The state

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the amount of money in each account, the Controller shall first determine the amount due each county, city and county, and city in the state, in the proportion that sales tax revenues transmitted pursuant to Part 1.5 . . . of this division to each such city, city and county and in the unincorporated territory of a county bear to a total of such revenue in the state. In making such determinations, the Controller shall not consider any revenues derived from that portion of the taxes imposed by the county at a rate in excess of 1 percent pursuant to Part 1.5 . . . of this division. The balance remaining in the fund shall be transmitted to the General Fund of the State.

Moneys disbursed pursuant to subdivision (b) of this section may be used for county, city and county, or city purposes, and may, but need not necessarily, be used for purposes of general interest and benefit to the state.

[6] Each purchaser liable for a use tax on tangible property shall be entitled to full credit for the combined amount or amounts of legally



does not afford a credit to persons who pay taxes to the Tribe. Hence, off-reservation sales will be subject to a single tax, while on-reservation sales are subject to a double tax. The state contends that the Multi-State Tax Compact does not deal with cigarette taxes. However, the Compact covers sales and use taxes; the tax at issue herein operates as a use tax.

The Tribe cannot prevail on this basis. The courts have distinctly stated that Indian tribes are not of equal status to state governments; tribal sovereignty is subject to plenary control by Congress.

> The United States, recognizing that tribes enjoy only a limited sovereignty, does not treat them as independent states. Therefore, for purposes of state jurisdiction over non-Indians, the federal interest in tribal political autonomy does not itself negate the fact that Indian reservations are parts of the states.

*White Mountain, supra,* at 1281-82. The Compact at issue involves a multiple state *agreement*. Thus, the Tribe should direct its argument to Congress, rather than to the state. The credit established by the Compact is afforded *only* to member states, of which there are approximately twenty-one. The Tribe's right to conduct itself as a state is subject to regulation by Congress. Tribal powers are divested "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." *Colville, supra,* at 153. Were tribes to operate as equal sovereigns with the states, our system of federalism would be disrupted.

3. The Indian Tribal Governmental Status Act

Congress, in enacting the Indian Tribal Governmental Status Act, Title II of Pub. L. No. 97-473, 96 Stat. 2605 (signed by the President Jan. 14, 1983), demonstrated its strong support for the

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imposed sales or use taxes paid by him with respect to the same property to another State and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the State, and any unused portion of the credit shall then be applied against the amount of any use tax due a sub-division.

concept of tax equivalency between state and tribal governments.The legislation amends the Internal Revenue Code to raise Indian tribal governments to the status of state and local governments for federal tax purposes. The Act authorizes, *inter alia*, a deduction from federal income taxes for taxes paid to an Indian tribe and provides that contributions to Indian tribal governments will be deductible for federal income, estate and gift tax purposes.

The Tribe contends that the evident federal policy considerations embodied in the Act should lead this court to find that the state's failure to afford the tribe a tax credit, as the state does some sister states, violates the Indian Commerce Clause. We are not persuaded that such policy condiderations may be extended to require this result. Congress has not mandated that the *states* treat all Indian tribes as if such tribes were the equivalent of state or local governments, although Congress was free to do so. Absent congressional authorization or mandate, we are not inclined to impose this burden on the states by fiat.

F. Enforcement

Under *Moe* and *Colville*, the state may validly require the Tribe to collect cigarette taxes from the purchaser and to keep records of the transactions. Moreover, the state may seize untaxed cigarettes while the cigarettes are transported in the state *before* they reach the reservation. *Colville, supra*. However, states cannot directly tax Indian reservation land or property. *McClanahan, supra; Bryan v. Itasca County*, 426 U.S. 373 (1976). *A fortiori*, a state cannot place an encumbrance upon tribal property. Moreover, Pub. L. 280, 18 U.S.C. § 1162 explicitly states:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, bank, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

Indian tribes enjoy immunity from suit, absent their consent or that of Congress. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). If a state cannot bring suit for affirmative relief, it should



not be permitted to invoke summary or extra-judicial procedures which do not provide the rudiments of due process. The state should not be able to achieve indirectly that which it cannot obtain directly.

IT IS HEREBY ORDERED that plaintiff's request for injunctive relief is hereby DENIED.

JUDGMENT FOR DEFENDANT.

Dated: September 15, 1983

/s/ ROBERT F. PECKHAM
Chief United States District
Judge

# OPPOSITION

# BRIEF

NO. 85-130

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

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CALIFORNIA STATE BOARD OF EQUALIZATION, et al.,

Petitioners,

vs.

THE CHEMEHUEVI INDIAN TRIBE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the California Cigarette Tax Law place the legal incidence of the tax on the Chemehuevi Indian Tribe?

2. Does the Chemehuevi Indian Tribe's immunity from unconsented suit bar the State's counterclaim?

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## STATUTORY PROVISIONS INVOLVED

1. California Revenue and Taxation Code Sections: 30005,30008, 30009, 30011, 30101, 30102, 30106, 30107 and 30108.
2. Title 18, California Administrative Code Section 4091.

The full texts of these statutes and regulations are set forth in the Appendix.

## STATEMENT OF THE CASE

The Statement of the Case set forth in the Petition omits several critical substantive and procedural facts which are material to the issues raised. To correct petitioners' omissions, and to show the significant factual differences between this case and Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) ["Colville"], the Chemehuevi Indian Tribe makes this counter-statement of the case.



This suit was filed on December 15, 1977, by the Chemehuevi Indian Tribe ("Tribe"), in order to prevent the State of California ("State"), through its Board of Equalization ("Board"), from summarily seizing and selling the Tribe's real and personal property and from otherwise interfering with the operation of the Tribe's business enterprise on the Chemehuevi Indian Reservation ("Reservation").

Since time immemorial, the Tribe has resided in the Chemehuevi Valley desert along the Colorado River, in the area which is now part of the Reservation. The Tribe is the beneficial owner of the Reservation, which comprises approximately 32,000 acres of land, legal title to which is held by the United States of America in trust for the benefit of the Tribe.

The Chemehuevi Tribal Council is the governing body of the Reservation and is recognized as such by the United States government through the Secretary of the Interior.

The Tribe is organized under Section 16 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §476. In 1976, pursuant to the Indian Reorganization Act, the Tribe adopted a constitution which, as subsequently amended, was approved by the Secretary of the Interior on April 21, 1977. Under that constitution, the Tribe is vested, inter alia, with the power to levy taxes and fees, and with all other powers necessary to promote the welfare of its people.

In 1976, the Tribe determined that the interests of the Tribe and its members would best be served by the economic development of its only tangible asset, the lands and resources of the



Reservation, and that this objective would be realized most readily by the purchase of the assets and facilities of Havasu Landing Inc. ("Landing"), a functioning business consisting primarily of a resort, marina, restaurant, grocery store and other related facilities. The Landing had previously been owned by non-Indians and operated on lands within the boundaries of the Reservation.

Lacking the capital with which to purchase the Landing, the Tribe applied for and received a loan from the Department of the Interior's Revolving Loan Fund, established under the provisions of the Indian Reorganization Act, in the amount of $1,200,000.

In May 1978, in order to expand and improve the Landing and to construct a new mobile home park, the Tribe applied for and received a loan under the

provisions of the Indian Finance Act of 1974, 25 U.S.C. §1451 et seq.

Both loans were made by the United States to the Tribe in furtherance of its policies as set forth in, inter alia, the Indian Reorganization Act of 1934, 25 U.S.C. §471 et seq., and the Indian Finance Act of 1974, 25 U.S.C. §§1451 et seq. The policies, as stated in these Acts, are to encourage and facilitate economic development on Indian reservations, and to foster Indian self-determination by strengthening Indian tribal governments.

In order to maintain the financial integrity of the Revolving Loan Fund, the Secretary has promulgated a regulation (25 C.F.R. §101.13) which requires that loans made from the Fund ordinarily be secured by collateral or security sufficient to ensure repayment.



Pursuant to 25 C.F.R. §101.13, and as security for its two loans, the Tribe assigned to the United States all the assets of both the Landing and the mobile-home park, and all present and future income from said enterprises. The Tribe also granted to the United States the right to demand, collect or sue for said income in its own name or the name of the Tribe. Under the repayment terms of the promissory notes executed by the Tribe, the Tribe has obligated itself to make monthly payments of interest and, later, of principal.

Pursuant to these loan agreements and under the provisions of the Indian Finance Act, the United States Department of the Interior, through the Bureau of Indian Affairs, provides on-going assistance to the Tribe in the management and operation of the enterprise. Shortly after the Tribe's loan was approved, the

Tribe purchased the Landing and began operating the business. At the time the Tribe commenced this action, it conducted the following businesses within the Reservation: a grocery store; bar; restaurant; marina; boathouse, which includes a gas station, and tackle shop; campground; motel; wildlife program, which includes the sale of fishing licenses; and a joint partnership for the retail sale of mobile homes. At its grocery store and boathouse the Tribe sells cigarettes at retail, along with a variety of other consumer products.

The Tribe, acting in its governmental capacity, provides the majority of governmental services on the Reservation. The Tribe provides: law enforcement; road construction; repair and maintenance; water purification and distribution; sewage treatment; garbage and solid waste disposal; public recreation; emergency



medical rescue and evacuation and postal service. All of these services are curtailed by lack of revenue.

In an effort to raise revenues to continue to provide and expand governmental services on the Reservation, the Tribe enacted a Business and Cigarette Tax Code which regulates the sale of cigarettes, imposes a tribal cigarette tax, and provides for the licensing of businesses on federal Indian trust land within the boundaries of the Reservation. Under the Code, the Tribe levies a tribal excise tax, equal to that of the State's cigarette tax, upon the purchase or possession of cigarettes and other tobacco products on the Reservation.

After enacting its Business and Cigarette Tax Code, the Tribe stopped collecting and remitting to the Board the State's cigarette sales or use tax.

Prior to enactment of its tax code, the Tribe's business enterprise was operating at a net loss of $36,921.00. The Tribe determined that this was due to the fact that monies earned by the Tribe in its proprietary capacity from the operation of the Landing were being expended by the Tribe in its governmental capacity to provide essential governmental services to all persons, tribal member and non-member alike, who resided, worked on or visited the Reservation, a majority of whom are non-tribal members.

After enactment of its tax code, the Tribe's business enterprise began operating at a profit. All of the tax revenues collected by the Tribe under its tax law are used to provide governmental services to persons present on the Reservation.

Assessment of California's cigarette sales or use tax, in addition to the



cigarette tax imposed by the Tribe's Ordinance, would double the tax rate on cigarettes purchased on the Reservation, thereby substantially reducing tribal tax revenues and profits to the Tribe and its business enterprise. The Tribe determined in enacting its ordinance that its ability to deliver essential services to persons on the Reservation would be diminished or eliminated if taxpayers were required to pay both the tribal and the state tax.

On December 9, 1977, David Cordier, a collection representative for the Board, delivered to the Bank of America ("Bank"), at its South Van Nuys Branch, a "withhold notice" issued pursuant to Revenue and Taxation Code ("R. & T. Code") §30311, advising the Bank that the Board had determined that the Tribe was delinquent in the payment of taxes due to the State in the amount of $11,702.95. This

notice further requested that the Bank withhold from the Tribe's funds in the Bank's possession the sum of $23,405.90, twice the amount of the claimed tax delinquency.

After service of the withhold notice, the Bank notified the Tribe that it would not release to the Tribe any monies in the Tribe's checking or savings account unless the balance remaining in both accounts after any such disbursement would be more than $23,405.90.

On or about December 6, 1977, the Board recorded liens against all Tribal property and assets located in San Bernadino and Los Angeles Counties, including property held in trust by the United States or purchased with Tribal funds, for taxes claimed to be owing and unpaid under R. & T. Code §§30001, et seq.

On or about December 9, 1977, the Board also had a warrant issued to the



Sheriff of Los Angeles County directing him to seize and sell such Tribal assets as might be necessary to satisfy the claimed liens.

Faced with the possible loss of its business enterprise and the seizure and sale of its on-Reservation trust property by the State, prior to any judicial determination of the validity of the State's tax, the Tribe had no choice but to commence this action.

## SUMMARY OF ARGUMENT

I.

A. There is no definitive California State Court decision interpreting the California Cigarette Tax Law. Lacking any guidance from the state courts, the Court below, consistent with the tests established by this Court in Moe v. Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976)

["Moe"] and Colville, properly held that the California Cigarette Tax Law did not contain a mandatory pass through provision, and, therefore, that the legal incidence of the State's tax fell upon the Chemehuevi Indian Tribe.

B. This Court in United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940) ["United States Fidelity Guaranty Co."], Santa Clara Pueblo v. Martinez, 436 U.S. 165 (1976) ["Santa Clara Pueblo"] and Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1976) ["Puyallup"], has already determined that absent tribal consent or an expressed waiver by Congress, an Indian Tribe is immune from suit, including suits initiated by cross-complaints or counterclaims. The law in this area is well settled and does not require reexamination.



C. The assertion of the doctrine of sovereign immunity to bar the State's counterclaim is particularly appropriate in the instant case, where the State is seeking to impose a tax directly on the Tribe and to seize tribal real and personal property to satisfy illegal tax liens.

## REASONS FOR DENYING THE WRIT

### I. THE ISSUES OF LAW RAISED BY THE PETITION FOR CERTIORARI ARE NOT NOVEL, HAVE BEEN ADDRESSED PREVIOUSLY BY THIS COURT, AND WERE RESOLVED BY THE NINTH CIRCUIT IN A MANNER CONSISTENT WITH THE PREVIOUS DECISIONS OF THIS COURT.

#### A. Consistent With This Court's Decisions In The Moe and Colville Cases, The Ninth Circuit Properly Determined That The Legal Incidence Of The California Cigarette Tax Law Falls On The Chemehuevi Indian Tribe.

Direct state taxation of tribal property or the income of reservation Indians is preempted by federal law, and hence invalid in the absence of express Congressional authorization. McClanahan

v. Arizona Tax Comm'n., 411 U.S. 164, 171-172 (1973).

In Moe and Colville, this Court held that where state law requires that a tax be passed on to a non-Indian buyer, i.e., mandatory pass through provisions, an Indian retailer is obligated to collect the tax from the buyer at the time of the sale.

The Court below correctly ruled that since the State's Cigarette Tax Law contained no mandatory provision requiring that the tax be passed on to the ultimate consumer, the legal incidence of the State's cigarette tax was on the Tribe as a retail seller of cigarettes. Chemehuevi Indian Tribe v. Cal. St. Bd. of Equal., 757 F.2d 1047, 1055-1057 (9th Cir. 1985) ["Chemehuevi"].

Applying the principles established by this Court in the Moe and Colville cases, the Court below based its



determination on the wording of the California Tax Law and the regulations promulgated thereunder by the Board. Id.

The operative sections of the law which define the legal incidence of the California cigarette tax are found in Part 13, Chapter 2, Article 1 of the California Cigarette Tax Law, entitled "Tax on Distributors". This "Tax on Distributors" is imposed by California Revenue and Taxation Code ("R. & T. Code") §30101 which states:

> Every distributor shall pay a tax upon his distribution of cigarettes at a rate of ...

Section 30008 defines distribution as: (a) the sale of untaxed cigarettes in this state and (b) the use or consumption of untaxed cigarettes in this state.

The State erroneously relies on R. & T. Code §30108(a) as a mandatory pass through provision. That Section is not a

substantive provision which passes the incidence of the tax through to the purchaser, but rather, is a procedural provision which merely requires distributors to collect the State's cigarette tax from purchasers when Section 30101 is inapplicable to a sale.

Section 30108(a) provides as follows:

> Every distributor engaged in business in this state and selling ... cigarettes with respect to the sale of which the tax imposed by Section 30101 is inapplicable shall ... collect the tax from the purchaser... .

Section 30107 provides an exception to the applicability of Section 30101 to a sale, i.e., to a distribution under Section 30008(a). Section 30107 places the incidence directly on the purchaser whenever a use or consumption of untaxed cigarettes in this state occurs, i.e., a distribution under Section 30008(b). The



key phrase in the section is "untaxed cigarettes."

Section 30005 defines "untaxed cigarette" to mean any cigarette which has not yet been distributed in such a manner as to result in a tax liability under this part. The key words in this section are "under this part."

As the Court below correctly found, sales, i.e., Section 30008(a) distributions to users and consumers, will always result in a tax liability to the seller under the cigarette tax law, except in the three specific situations when a use or consumption occurs. Those situations in which the seller does not pay the tax, resulting in a use or consumption, i.e., the purchase of untaxed cigarettes, are

carefully defined in the state law. [1] None of those situations includes a sale by an in-state retailer, such as the Chemehuevi Indian Tribe, which is not a federal instrumentality, to an in-state user or consumer, such as a non-Indian purchaser of cigarettes at the tribal store.

Accordingly, a tribal cigarette sale to a non-Indian purchaser is not a distribution under Section 30008(b) for which Section 30107 would obligate the user or consumer to pay the tax, although it is a distribution under 30008(a) to which Section 30101 would apply. It is not, therefore, a transaction under

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1. The use or consumption of untaxed cigarettes can occur in three ways: (1) when a buyer located within the state purchases cigarettes from an out of state retailer; (2) when a buyer brings more than 400 cigarettes into California from outside the state, and (3) when a buyer purchases more than 400 cigarettes from a federal instrumentality. See, i.e. R. & T. Code Sections 30008, 30009, 30011, 30101, 30102, 30106 and 30107.



Section 30108(a) in which the tribal seller is not itself obligated to pay the tax (i.e., a sale in which Section 30101 applies to the seller) and in which the purchaser is obligated to pay the tax. Since this is the only time a seller is ever obligated to collect a tax from the purchaser, the conclusion of the Court below is obviously correct: Section 30108(a) does not shift the legal incidence of the tax from the tribal seller in this case to the non-Indian purchaser. Chemehuevi, supra, at 1057. The State Legislature obviously never contemplated a situation, other than one involving a "federal instrumentality," where an in-state retailer would not be obligated to pay the State cigarette tax. Certainly, this Court should not rewrite this complex taxing scheme to accomplish for the State Legislature what it has not attempted to accomplish on its own.

As the Court below properly determined, not only has the State Legislature failed to declare its intent to create an automatic pass-through, but the implementing state regulation, Title 18 of the California Administrative Code, Section 4091, explicitly supports this interpretation by listing the three specific situations in which Section 30107 imposes the legal incidence of the tax on the purchaser. This regulation directly contradicts the State's assertion in this litigation that Section 30108(a) is intended to impose a tax on the first constitutionally taxable distribution.

The State argues in its petition that the California cigarette taxing scheme is significantly similar to the Washington State statutes at issue in Colville, and, therefore, should be construed as shifting the legal incidence of the California tax from the Tribe to the



first constitutionally taxable sale; that is, to the non-Indian purchaser.

This argument ignores the fact that this Court in Colville found an automatic pass-through provision in the Washington taxing scheme only because the Washington Legislature had expressly declared its intent to create such a mechanism and the Washington State Supreme Court and Attorney General had already construed the statute as shifting the legal incidence of the tax to the non-Indian purchaser.

In Colville, the Washington State Legislature amended its cigarette tax statute to provide:

> It is also the intent and purpose of this Chapter that the tax shall be imposed at the time and place of the first taxable event occurring within this state. (Emphasis added). R.C.W. §82.24.080

Confederated Tribes of the Colville Reservation v. Washington, 446 F. Supp.

1339, 1353-1355 (E.D. Wash. 1978) ["Confederated Tribes"].

As stated earlier, the Washington Attorney General and the Washington Supreme Court had both construed the statute as shifting the legal incidence of the tax to the first taxable event occurring within the state. In the case of an Indian seller, the first taxable event was the use or consumption of cigarettes by the non-Indian buyer (a valid tax under Moe).

In contrast, the California Cigarette Tax Law contains no similar provision evidencing an intent by the State Legislature to shift the incidence of the tax to the first constitutionally permissible taxable event. Nor is there any decision of the California Supreme Court or Attorney General's Office interpreting the California Cigarette Tax Law in such



a manner. [2] Rather, the regulation promulgated by the Board (petitioner herein) supports the argument advanced by the Tribe that R. & T. Code §30108 does not constitute a mandatory pass-through provision.

Based on the foregoing, the Court below, applying the rules established by this Court in Moe and Colville, properly held that R. & T. Code §30108 was not a mandatory pass-through provision and that the legal incidence of the State's tax fell on the Tribe. [3] Chemehuevi, supra, at 1059.

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2. Similarly, as did the Court below, in Confederated Tribes the District Court refused to construe the other tax at issue in that case, a tobacco products tax, as containing a mandatory pass-through provision in the absence of express statutory language, definitive state court decisions or administrative regulations indicating that such a provision was intended. Id., at 1355, n. 15.

3. If the State wants a tax statute which imposes the legal incidence of the tax on the consumer, it can easily amend its statute to so provide as did the State of Washington in the Colville case.

As illustrated above, the State in its petition has not raised any issues of law that have not been previously addressed and decided by this Court. In deciding this case, the Court below correctly applied the decisions of this Court to the facts of this case.

B. Consistent With This Court's Decision In United States Fidelity & Guaranty Co., Puyallup And Martinez, The Ninth Circuit Properly Dismissed The State's Counterclaim On Grounds Of Tribal Immunity From Suit. There Is No Justification To Reexamine The Doctrine Of Tribal Immunity, Particularly In This Case.

In its petition the State has abandoned its argument, advanced in the Court below, that Fed. R. Civ. P. 13(a) constitutes an express Congressional waiver of the Tribe's sovereign immunity from suit. See, e.g., Chemehuevi Indian Tribe v. Cal. State Bd., 492F. Supp. 55, 59 (N.D. Cal. 1979). The State admits, as it must, that the prior decisions of this Court bar its counterclaim against



the Tribe. See, United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940); Puyallup Tribe v. Department of Game, 433 U.S. 105 (1977)["Puyallup"]; Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

As a last resort the State invites this Court to "reexamine" these well-settled and salutary principles of federal Indian law. Cert. Pet., pp. 8-9. If this Court were to accept the State's invitation, it could only create confusion in both the lower federal and state courts where certainty now prevails. Bottomly v. Passamaquoddy Tribe, 559 F.2d 1061 (1st Cir. 1979); Haile v. Saunooke, 246 F.2d 293 (4th Cir. 1957); Maryland Casualty Co. v. Citizens National Bank of North Hollywood, 361 F.2d 517 (5th Cir. 1966); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967);

People v. Quechan Tribe of Indians, 595 F.2d 1153(9th Cir. 1979); Hydrothermal Energy v. Fort Bidwell, Indian Comm., ___ Cal. App. 3d ___ 216 Cal. Rptr. 59 (Cal. App. 2 Dist. 1985).

The State's arguments to support its requested "reexamination" totally lack merit. The Tribe will now explain why this case is a totally inappropriate vehicle for reexamining the doctrine of tribal sovereign immunity.

First, the State has no legal rights to enforce against the Tribe in this case. The imposition of the State's cigarette tax falls squarely on the Chemehuevi Indian Tribe and the tax is, therefore, void and unenforceable. Colville, supra, at 150-151; McClanahan v. Arizona Tax Comm'n., 411 U.S. 164, 178-179 (1973).

Second, the Tribe was forced to initiate this action and assert its



sovereign immunity from suit in order to prevent the State from seizing and selling its real and personal on-Reservation trust property. By asserting its sovereign immunity from suit, the Tribe was exercising its inherent and Congressionally delegated sovereign power to prevent the alienation and encumbrance of its property. See, e.g. 25 U.S.C. §476. 4/ It is precisely in this type of situation that the courts have held that tribal sovereign immunity should be asserted, even if such immunity creates hardship or injustice for a creditor of the Tribe. Maryland Casualty Co. v. Citizens National Bank of North Hollywood, 361 F.2d 517 (5th Cir. 1966);

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4. Even when Congress has acted to grant states limited jurisdiction over reservation Indians, it has always protected tribal property from alienation, encumbrance and taxation. See, e.g., 28 U.S.C. §1360: "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property...belonging to any...Indian Tribe...".

Long v. Chemehuevi Indian Reservation, 115 Cal. App. 3d 853 (4th App. Dist. 1981), cert. den. 454 U.S. 831 (1981).

Third, the State has an effective, judicially sanctioned, method of enforcing its Cigarette Tax Law. In Colville, 447 U.S. 134, 161-162 (1980), this Court specifically authorized a state to seize untaxed cigarettes en route to the reservation. This remedy allows the State to enforce its tax law against tribal retailers while at the same time preserving the doctrine of tribal sovereign immunity. 5/

Fourth, assuming the Court below had ruled against the Tribe, and assuming further that the Tribe refused to voluntarily comply with the Court's judgment,

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5. The Board has used this very enforcement technique with great success, seizing a shipment of untaxed cigarettes destined for the San Manual Indian Reservation on September 25, 1980. That seizure was widely publicised and had the immediate effect of closing down most of the smokeshops in California.



the State has an effective judicial remedy that does not require a reexamination of the doctrine of tribal sovereign immunity. In Puyallup this Court clearly drew a distinction between claims brought by a sovereign state against an Indian tribe, which were barred by the doctrine of sovereign immunity, and claims against individual tribal members, which were not. Id. at 172. While under settled principles of tribal sovereign immunity, the State could not maintain an action against the Tribe for equitable relief or money damages, the State could initiate an action for injunctive relief against individual tribal employees to compel compliance with the Court's judgment. The State has not sought such a remedy. Any inadequacy in the remedies available to the State results from this voluntary

choice and not the doctrine of tribal sovereign immunity. [6]

Finally, the tribal immunity doctrine advances the strong federal policies of encouraging tribal autonomy and self-determination, by protecting Indian tribes from intrusive interferences into their governmental perogatives. See, e.g. 25 U.S.C. §450. [7]

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6. The availability of a remedy against individual tribal officials, however, is not presented by this case since the State never raised the issue below. Generally, contentions and arguments that were not ruled upon by the Court of Appeals are deemed inappropriate for review by this Court. United States v. Fleischman, 339 U.S. 349, 365 (1950); Owens v. Union Pacific R. Co., 319 U.S. 715, 725 (1943).

7. In the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450 et seq., Congress reaffirmed the concept of tribal sovereign immunity be declaring: "Nothing in this Act shall be construed as...affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian Tribe... 25 U.S.C. §450n.



For these reasons, any alteration to the tribal immunity doctrine should come from the Congress, not the judiciary. As Thebo v. Choctaw Tribe, 66 F. 371 (8th Cir. 1895), held many years ago:

> It may be conceded that it would be competent for Congress to authorize suit to be brought against the Choctaw Nation ... but no court has ever presumed to take jurisdiction of a cause against [Indian tribes] in the absence of an act of Congress expressly conferring the jurisdiction in the particular case.

Id. at 373-374.

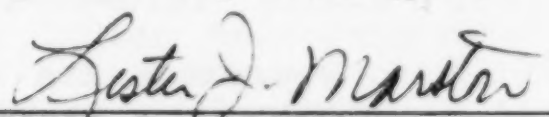
Absent an explicit waiver of the Tribe's sovereign immunity by Congress, this Court, consistent with its prior decisions, should refuse the State's invitation to reexamine the doctrine of tribal sovereign immunity.

## CONCLUSION

This Court has considered and determined the circumstances in which a state may require an Indian retailer to

collect a cigarette tax from a non-Indian purchaser in Moe and Colville, and has upheld tribal immunity from suit in United States Fidelity & Guaranty Co. and Martinez. Moreover, this Court has specifically upheld the doctrine of tribal sovereign immunity in Puyallup, even as to an action maintained by a sovereign state. The decision of the Court of Appeals is consistent with those decisions. For these reasons and the reasons stated above, respondent, Chemehuevi Indian Tribe, respectfully urges this Court to deny the State's Petition for a Writ of Certiorari.

Repsectfully submitted,



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Attorneys for Respondent

## § 30005. Untaxed cigarette

"Untaxed cigarette" means any cigarette which has not yet been distributed in such manner as to result in a tax liability under this part.

## § 30008. Distribution

"Distribution" includes:

(a) The sale of untaxed cigarettes in this state.

(b) The use or consumption of untaxed cigarettes in this state.

(c) The placing in this state of untaxed cigarettes in a vending machine or in retail stock for the purpose of selling the cigarettes to consumers.

## § 30009. Use or consumption

"Use or consumption" includes the exercise of any right or power over cigarettes incident to the ownership thereof, other than the sale of the cigarettes or the keeping or retention thereof for the purpose of sale.

## § 30011. Distributor

"Distributor" includes:

(a) Every person who, after 4 o'clock a. m. on July 1, 1959, and within the meaning of the term "distribution" as defined in this chapter, distributes cigarettes.

(b) Every person who sells or accepts orders for cigarettes which are to be transported from a point outside this State to a consumer within this State.

## § 30101. Rate

Every distributor shall pay a tax upon his distributions of cigarettes at the rate of one and one-half mills ($0.0015) for the distribution after 4 o'clock a. m. on July 1, 1959, of each cigarette until 12:01 o'clock a. m. on August 1, 1967, and at the rate of three and one-half mills ($0.0035) for the distribution of each cigarette on and after August 1, 1967, until 12:01 o'clock a. m. on October 1, 1967, and at the rate of five mills ($0.005) on and after 12:01 o'clock a. m. on October 1, 1967.

**§ 30102. Exempt sales**

The taxes imposed by this part shall not apply to the sale of cigarettes to:

(a) United States Army, Air Force, Navy, Marine Corps or Coast Guard exchanges and commissaries and Navy or Coast Guard ships' stores, or

(b) The United States Veterans Administration.

## § 30107. User or consumer liable for tax

The taxes resulting from a distribution of cigarettes within the meaning of subdivision (b) of Section 30008 shall be paid by the user or consumer.

## § 30108. Collection of tax; receipt; "engaged in business in state" defined; taxes as debt owed

(a) Every distributor engaged in business in this state and selling or accepting orders for cigarettes with respect to the sale of which the tax imposed by Section 30101 is inapplicable shall, at the time of making the sale or accepting the order or, if the purchaser is not then obligated to pay the tax with respect to his distribution of the cigarettes, at the time the purchaser becomes so obligated, collect the tax from the purchaser, if the purchaser is other than a licensed distributor, and shall give to the purchaser a receipt therefor in the manner and form prescribed by the board.

(b) Every person engaged in business in this state and making gifts of untaxed cigarettes as samples with respect to which the tax imposed by Section 30101 is inapplicable shall, at the time of making the gift or, if the donee is not then obligated to pay the tax with respect to his distribution of the cigarettes, at the time the donee becomes so obligated, collect the tax from the donee, if the donee is other than a licensed distributor, and shall give the donee a receipt therefor in the manner and form prescribed by the board. This section shall not apply to those distributions of cigarettes which are exempt from tax under Section 30105.5.

(c) "Engaged in business in the state" means and includes any of the following:

(1) Maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.

(2) Having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the distributor or its subsidiary for the purpose of selling, delivering, or the taking of orders for cigarettes.

(d) The taxes required to be collected by this section constitute debts owed by the distributor, or other person required to collect the taxes, to the state.





4091. **Payment by Consumer.** Each consumer or user of cigarettes subject to the tax, resulting from his having purchased cigarettes in any quantity which cigarettes are shipped to him from out of state, his having himself transported or brought into the state untaxed cigarettes in quantities of more than 400 cigarettes in a single lot for his own use or consumption, or having obtained more than 400 untaxed cigarettes at one time from a federal instrumentality listed in section 30102 of the Cigarette Tax Law, must pay the tax:

(a) to the licensed or registered distributor under the Cigarette Tax Law from whom the cigarettes were purchased, or

(b) directly to the board if the person from whom the cigarettes were purchased is not a licensed or registered distributor. Consumers or users will be liable for payment of the tax to the board unless receipts as provided by regulation 4092 are obtained for payment of the tax to the distributor.

# OPINION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

# SUPREME COURT OF THE UNITED STATES

## CALIFORNIA STATE BOARD OF EQUALIZATION ET AL. *v.* CHEMEHUEVI INDIAN TRIBE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–130. Decided November 4, 1985

PER CURIAM.

Since 1959 California has imposed an excise tax on the distribution of cigarettes. Respondent Chemehuevi Indian Tribe sells cigarettes on its reservation in southeastern California. The Tribe originally remitted the state tax to petitioner State Board of Equalization insofar as that tax was imposed on the distribution of cigarettes to non-Indian purchasers. But in 1977 the Tribe enacted a cigarette tax of its own that was the equivalent of the California tax, and then ceased collecting and remitting the state tax. When California sought to obtain the unremitted tax from the Tribe, the Tribe brought an action in the United States District Court for the Northern District of California requesting a declaratory judgment that petitioner could not lawfully apply the state tax to cigarettes sold by the Tribe to non-Indian purchasers. Respondent Tribe also sought an injunction preventing petitioner from enforcing the state cigarette tax against it. Petitioner counterclaimed for damages in the amount of back taxes claimed to be owed by respondent Tribe.

The District Court held that petitioner's counterclaim was barred by sovereign immunity, 492 F. Supp. 55 (1979), but also held that California could lawfully require the Tribe to collect cigarette excise taxes imposed on cigarettes that it sold to non-Indians. On appeal, the Court of Appeals affirmed the first determination, but reversed the second. 757 F. 2d 1047 (CA9 1985).

The Court of Appeals observed that, unlike the Washington statute that we considered in *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980), California's cigarette tax statute "does not contain any . . . *explicit* 'pass-through' language," 757 F. 2d, at 1056 (emphasis added), and that therefore the question of the legal incidence of the California cigarette tax was not controlled by our decision in that case. *Id.*, at 1055–56. It went on to observe that a "legislative intent to impose even a collection burden should be *explicitly* stated." *Id.*, at 1056, n. 11 (emphasis added). The Court of Appeals concluded that the California excise tax, properly construed, did not impose liability on the ultimate purchaser of cigarettes when the vendor was not a taxable entity. *Id.*, at 1057, and n. 13.

We think that the Court of Appeals applied a mistaken standard in determining whether or not the California tax on cigarettes was sufficiently like the Washington tax involved in *Colville* so that the result in the latter case should be controlling here. None of our cases has suggested that an express statement that the tax is to be passed on to the ultimate purchaser is necessary before a State may require a tribe to collect cigarette taxes from non-Indian purchasers and remit the amounts of such tax to the State. Nor do our cases suggest that the only test for whether the legal incidence of such a tax falls on purchasers is whether the taxing statute contains an express "pass on and collect" provision. Indeed, the Washington statute in *Colville* did not contain an express pass-through provision; the conclusion of the District Court in that case, which we accepted, was that the statutory scheme required consumers to pay the tax whenever the vendor was untaxable, and thus the legal incidence of the tax fell on purchasers in such cases. 447 U. S., at 142, and n. 9. The test to be derived from cases such as *Colville* and *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463, 481–483 (1976), is nothing more than a fair interpretation of the taxing statute as written and applied, without any requirement that pass-through provisions or collection requirements be "explicitly stated." Cf. *United States* v. *Mississippi Tax Comm'n*, 421 U. S. 599, 607–608 (1975).



We think the fairest reading of California's cigarette scheme as a whole is that the legal incidence of the tax falls on consuming purchasers if the vendors are untaxable. California Rev. & Tax Code Ann. §30107 (West 1979) clearly seems to place on consumers the obligation to pay the tax for all previously untaxed cigarettes. The Board's implementing regulation does not restrict this obligation to the hypotheticals contained in the regulation; it merely indicates that the consumer has a duty to pay any tax directly to the Board when the vendor is the type of entity on which the State cannot impose a collection requirement. See Cal. Admin. Register 72, No. 16, Tit. 18, Art. 16, §4091. The regulation does not address itself to the question of legal incidence. And since both *Colville* and *Moe* hold that if the legal incidence of a state excise tax falls on non-Indian purchasers, the State may impose on the tribe the burden of collecting that tax from the purchasers, 447 U. S., at 159; 425 U. S., at 482–483, this particular regulation is inapplicable to purchasers from Indian tribes if the ultimate liability for the tax falls on the purchaser when the vendor is not taxable. We think that in the context of the entire California statutory scheme, interpreted without any of the restrictive requirements which the Court of Appeals employed, Cal. Rev. & Tax Code Ann. §30108(a) (West 1979) evidences an intent to impose on the Tribe such a "pass on and collect" requirement. We hold that the legal incidence of California's cigarette tax falls on the non-Indian consumers of cigarettes purchased from respondent's smoke shop, and that petitioner has the right to require respondent to collect the tax on petitioner's behalf.

The petition for certiorari is granted on the first three questions it presents. Insofar as the Court of Appeals held that respondent might not be required to collect the cigarette

tax imposed by California on non-Indian purchasers at tribal smoke shops, its judgment is

*Reversed.*

JUSTICE BRENNAN would deny certiorari.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

JUSTICE BLACKMUN would grant certiorari and give the case plenary consideration.

# OPINION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

# SUPREME COURT OF THE UNITED STATES

## CALIFORNIA STATE BOARD OF EQUALIZATION ET AL. *v.* CHEMEHUEVI INDIAN TRIBE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–130. Decided November 4, 1985

JUSTICE STEVENS, dissenting.

The Courts of Appeals are better qualified to decide questions of State law than is this Court. Most circuit judges formerly practiced in States within their respective circuits. As judges, they must confront State law issues on a regular basis. For these reasons, it has long been the settled practice in this Court to show the greatest deference to opinions of the Courts of Appeals on questions of State law. "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949). See also *Haring* v. *Prosise*, 462 U. S. 306, 314 n. 8 (1983) ("a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review"); *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 181 n. 11 (1979) ("it is not our practice to re-examine state-law determinations of this kind"); *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976) and cases cited therein.

The outcome of this case depends entirely on an interpretation of the California Revenue & Taxation Code. I am not prepared to say that the Court of Appeals' construction of the California Code is correct or incorrect.[1] I am prepared,

[1] The Court of Appeals summarized its construction of the California statute as follows:

"Upon careful examination, it is apparent that section 30108(a) is merely a procedural section that denotes the manner in which a vendor shall collect

however, to disagree with the Court's conclusion that we should undertake to decide the State law question in a case of this kind. Even if the Court is correct in its view that the Court of Appeals applied a mistaken standard in construing the California tax,[2] that premise does not justify the action of the Court today in undertaking to decide the State law issue on its own—particularly when that issue has not been fully briefed and argued. At most, the Court should remand the case to the Court of Appeals for a reconsideration under the proper standard. Such a remand would at least demonstrate that this Court has not forgotten that "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we" to interpret state law. *Butner* v. *United States*, 440 U. S. 48, 58 (1979). Because the Court's summary disposition conveys a different message, I respectfully dissent.

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a tax from a purchaser if and when the purchaser is obligated to pay the tax. In the case of a sale with respect to which 'the [usual cigarette] tax imposed by Section 30101 is inapplicable,' the vendor is required to collect the tax from the purchaser either (a) at the time of sale, if the purchaser is then obligated to pay the tax, or (b) if the purchaser is not then obligated to pay the tax, at the time the purchaser becomes so obligated. Cal. Rev. & Tax. Code ¶ 30108(a) (West 1979). Collection by the vendor is mandatory, but only if and when the purchaser has a tax obligation. The section does not contain any substantive provisions that themselves impose any tax or that indicate when section 30101 is inapplicable. Nor does it specify under which situations a purchaser is obligated to pay the tax at the time of sale or, if the purchaser is not than obligated, when the purchaser becomes so obligated. We find no language in section 30108—the only section on which the Board relies for its argument that the incidence of the tax falls upon the purchaser—that remotely suggests a legislative intent to have the purchaser pay the tax whenever the vendor is a non-taxable entity." 757 F. 2d 1047, 1056–1057 (CA9 1985) (footnotes omitted).

[2] The portion of the Court of Appeals opinion which I have quoted in n. 1 *supra* suggests that the Court of Appeals would have reached the same conclusion even if it had not used the unfortunate word "explicit" earlier in its opinion.